# United States Court of Appeals for the Second Circuit



**APPENDIX** 

13-7404

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 75-7404

ARNOLD MARSHEL,

Plaintiff-Appellant,

V.

AWF FABRIC CORP., CONCORD FABRICS, INC. ALVIN WEINSTEIN and FRANK WEINSTEIN,

Defendants-Appellees.

BARRY L. SWIFT,

Plaintiff-Appellant,

V.

CONCORD FABRICS, INC., AWF FABRIC CORP., ALVIN WEINSTEIN and FRANK WEINSTEIN,

Defendants-Appellees.

Appeal from Order of the United States District Court for the Southern District of New York Denying Preliminary Injunction

#### APPENDIX

RUBIN BAUM LEVIN CONSTANT & FRIEDMAN Attorneys for Plaintiff-Appellant,

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PAGINATION AS IN ORIGINAL COPY

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DOCKET DEMAND THEM FILING DATE 0 YH. NUMBER MO. DAY YEAR AL THE E ?3 02 28 75 1018 208-1 1018 3 850 1 0840 53 3V DEFENDANTS PLAINTIFFS AFW FABRIC CORP. CONCORD FABRICS, INC. MARSHEL, ARNOLD WEINSTEIN, ALVIN WEINSTEIN, FRANK CAUSE Violation of S.E.C. Act of 1934. ATTORNEYS Kaye Scholer Fierman Hays & Handler Rubin, Baum, Levin, Constant & 425 Park Ave. NYC 10022 Pl 9-8400 Friedman 598 Madison Avenue New Work, N.Y. 10022 tele: P1 9-2700

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Page #1

PROCEEDINGS

Filed complaint and issued summons.

Filed Affdyt&Order appointing process served by Julius Coldstein of June Complaint for Pltff.So Ordered.Clk

Filed Memo-End on a COPY of Pitff's Order to Show Cause...... Notion withdrawn. See letter of counsel dated 3-3-75... It is so Ordered... Tylor, '.

riled Pitff's Memo of law in support of Mition for Tin

Filed order to show cause respreliminary infunction, etc. Leafer, J. (motion withdrawn - docket entry dated 3- 0-75 see above)

Filed pltff.'s memo. oflaw in support of motion for a temporary restricting order and preliminary injunction.

Filed pltff.'s notice of motion re: preliminary injunction enjoining defts. AFT Fabric and Concord Fabrics, Inc. ret: 3-2'-75.

Filed pltff.'s memo. of law in support of motion for a preliminary injunction.
Filed pltff's motion for concediated discovery with Notice to Take Deposition of deft AFW Fabric Corp ret 3/18/75.

Filed Meno end.on motion . Within motion is respectfully referred to Mas. Jacobs

Filed Summons with affdyt of service of Summons & Complaint by Julius Goldstein for pltff upon AFW Fabric Corp , Concord Fabrics, Inc. & Alvin Weinstein& Frank Weinstein. 3/3/75

Filed Pltffs amended complaint Class Action (in part)

TRE-TRIAL CONTINUES HELD BY May Schreiber

Filed defts affdvt in opposition to motion for preliminary injunction

Filed defts memo of law in opposition to motion for prelim. injunction.

Filed defts memo of law in support of their motion to consolidate four related actions & for other relief.

Filed Stip & Order extending to 4-14-75 for each def't to anser or make any motion re amended complt, etc.....MAC MAHON, J.

Filed pltffs reply affdvt re document discovery in Marshel action.

Filed pltfs joint reply memorandum in support of motion for preliminary injunction.

Filed Stip & Order that (AFW & Concord) will not consummate proposed merger by filing a Certificate of Merger with the Sec. of State of N.Y. pending the determination of motions made by pltff in each of the four captioned actions for prelim. inj. with conditions as indicated. MAC MAHON, J

Filed Stip. & Order that the time for all defts to answer the smended complt. is ext. from 4-14-75 to the period ending 10 days after the date of filing of order of Judge MacMahon granting or denying pltff's pending motion for a prel. inj....
.....MacMahon, J.

Filed Memo-End. on unsigned order to show cause. Motion granted to extent set forth in opinion & order of this date.....MAC MAHON, J

Con't on Page #2

DATE	PROCEEDINGS
25-75	Filed Opinion #42667. Pltffs in these four related cases move to enjoin preliminarily proposed merger between Concord Fabrics & AFW Fabric Corp. Pltff Michaels seeks leave to file an amended complt. Defts move for an order consolidating the four actions for all purposes, appointing a general or liaison counsel for pltffs & staying Concord shareholders from commencing any additional actions based on proposed merger. For reasons indicated in the opinion, pltfs motions are denied. Deft's motion to consolidate the actions is granted & all four actions are consolidated for pre-trial purposes. Counsel in the Marshel action are appointed general counsel for pltffs in all four cases & they are directed to file a consolidated amended complt encompassing all parties & all claims in the Marshel, Michaels & Krause cases within twenty (20) days. The Swift case will proceed on its original complt. All sharleholders of Concord are stayed pending a determination whether these actions may proceed as class actions pursuant to Rule 23So Ordered, MAC MAHON, J m/n (Entered in 75 Civ 1027, 75 Civ 1064 & 75 Civ. 1465)
7-7-75	NOTICE OF APORAL
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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ARNOLI MARSHEL,

Plaintiff,

: 75 Civil 1018

H.R.T.

'-against-

:

AMENDED COMPLAINT

AFW FABRIC CORP., CONCORD FABRICS, INC., ALVIN WEINSTEIN and

FRANK WEINSTEIN,

: CLASS ACTION (IN PART)

Defendants:

Plaintiff, by his attorneys, Rubin Baum Levin Constant & Friedman, for his amended complaint, complaining of the defendants, respectfully alleges upon information and belief, except as to the allegations contained in Paragraphs 5 and 6 which are alleged upon knowledge, as follows:

#### JURISDICTION AND VENUE

- 1. This Court has jurisdiction of this action under Section 27 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), 15 U.S.C. 78aa, and the principles of pendent jurisdiction.
- 2. The claims alleged herein arise under the Exchange Act, and in particular Sections 10(b), 13(d), 14(a), 14(d) and 14(e), 15 U.S.C.78j(b), 78(m)(d), 78n(a), 78n(d) and 73(n)(e) thereof, the Rules and Regulations of the Securities and Exchange Commission promulgated thereunder, and common law principles.
- 3. The acts complained of occurred part in the Southern District of New York.

- 4. In connection with the acts, conduct and other wrongs complained of herein, the defendants, directly and indirectly, used means and instrumentalities of interstate commerce and the mails.
- 5. This action is not brought collusively to confer jurisdiction on a court of the United States which it would not otherwise have.

#### The Parties

- 6. Plaintiff is the owner and holder of 500 shares of common stock of the defendant Concord Fabrics, Inc. ("Concord").

  He has been a common stockholder of Concord continuously since

  January 20, 1969 up to and including the present time, and at the time of the transactions complained of herein. He paid \$22.25 per share for each of the aforesaid 500 shares, or an aggregate price, including commissions, of \$11,271.25.
- 7. Concord is a New York corporation. Its principal offices are located in the Southern District of New York.
- 8. (a) The individual defendants Alvin Weinstein and Frank Weinstein are brothers and are, respectively, the Chairman of the Board of Directors and the Chairman of the Executive Committee of Concord.
- or indirectly at least 611,000 shares of the common stock of Concord. Their combined ownership represents, in the aggregate, approximately 68% of Concord's outstanding common stock and constitutes effective control of Concord. Through their executive

positions and their stock control of Concord, the individual defendants dominate and control the business and financial policies and affairs of Concord.

- 9. (a) Defendant AFW Fabric Corp. ("AFW") is, and has been since approximately January 1, 1975, a New York corporation.
- (b) AFW was organized for the sole purpose of effectuating the plan of the individual defendants to usurp unto themselves, in violation of both the Exchange Act and their fiduciary duties to Concord and to its minority shareholders, the entire stock ownership of Concord.
- (c) On February 5, 1975, the individual defendants transferred to AFW 1,226,549 shares of common stock of Concord, representing approximately 68% of Concord's outstanding common stock, in exchange for which they received all of the outstanding capital stock of AFW.
  - (d) The individual defendants control AFW.

#### The Financial History of Concord

- 10. When Concord became a publicly-held corporation on or about July 11, 1968 it sold to the public, pursuant to a Registration Statement and Prospectus which then became effective, 300,000 shares of common stock at a price of \$15 per share, for a total sales price of \$4,500,000.
- 11. (a) The individual defendants had acquired all of their shares of common stock of Concord for a nominal price prior to the public offering.

- (b) In June, 1969 each of the individual defendants sold to the public 100,000 shares of Concord's common stock at a price of \$20 per share, for a total sales price of \$2,000,000.
- 12. (a) Concord has prospered since the initial sale of its securities to the public in July, 1968.
- (b) Immediately after Concord's sale to the public of 300,000 of its shares in July, 1968 at \$15 per share, the book value of Concord's common stock was \$6.75 per share.
- (c) The present disclosed book value of Concord's common stock exceeds \$7.75 per share.
- reflected in the foregoing figures, for the individual defendants have caused Concord to issue financial information in which earnings have been improperly depressed or deferred by the introduction of substantial and improper inventory mark-downs and by unwarranted reserves and by the utilization of other improper accounting practices.
  - 14. In the second quarter of the current fiscal year (i.e., December, 1974 through February, 1975), Concord's sales are running at least 25% higher than in the comparable period in the preceding fiscal year and net income is substantially higher.

# Class Action Allegations

of the complaint as a class action against all defendants, pursuant to Rule 23(b)(1), (2), and (3) of the Federal Rules of Civil Procedure.

- (b) The Class consists of plaintiff and all common stockholders of Concord similarly situated, who are threatened with the forced sale or who become forced sellers of their common stock of Concord, under and pursuant to the now-pending purchase offer of AFW and the now-pending merger of AFW and Concord. Excluded from the Class are the individual defendants and members of the immediately family of each of those individual defendants, and any entity in which any of the individual defendants or any member of their immediate family has a beneficial controlling interest.
- (c) The members of the Class are so numerous that joinder of all members is impracticable. Concord las approximately 1,000 common stockholders located throughout the United States.
- herein which are common to the Class and which predominate over any questions affecting individual members of the Class. The common questions of law and fact include the questions whether Sections 10(b), 13(d), 14(a), 14(d) and 14(e) of the Exchange Act and Rule 10b-5 and Regulations 14A have been violated; whether defendants have perpetrated and are continuing to perpetrate devices, schemes and artifices to defraud the public common stockholders of Concord, and have made material false and misleading statements and have of itted material facts, and have engaged and are continuing to engage in acts, practices and a course of business conduct which are operating as a fraud and deceit upon plaintiff and other members of the Class, in relation to the scheme to force the Class to sell their common stock of Concord at prices which are unfair and unreasonable; the mode of relief to which the Class is en-

titled, including injunctive and other equitable relief, and damages, and the measure of damages.

- (e) Plaintiff will fairly and adequately protect the interest of the Class; he is a member of the Class and his claims are typical of the claims of all class members. Plaintiff does not have interests antagonistic or in conflict with those he represents.
- (f) The prosecution of separate actions would create the risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the defendants; and would create the risk of adjudications with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests.
  - (g) A class action is superior to other available methods for the fair and efficient adjudication of the claims made herein.
  - (h) This Court is the appropriate forum for an adjudication of the class claims. The headquarters of Concord and its pertinent books and records are located in the Southern Distirct of New York. The individual defendants reside or engage in business in the Southern District of New York, and the convenience of witnesses favors this forum.

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# THE CONSPIRACY, ITS OBJECTIVES AND ACTS IN FURTHERANCE THEREOF

- 16. Commencing sometime prior to January, '975 and continuing thereafter, the individual defendants together with AFW entered into a plan, combination and conspiracy (i) to freeze out the public shareholders of Concord and (ii) to do so at unreasonably low prices, all for the private gain of the individual defendants, by the use of illegal, improper, deceptive and fraudulent acts and practices in violation of the provisions of the Exchange Act.
- 17. In implementing the plan, combination and conspiracy, the individual defendants and AFW made use, directly or indirectly, of the means and instrumentalities of interstate commerce and the mails.
- and continue to implement the aforesaid plan, combination and conspiracy by, among other means (i) filing and disseminating a false and misleading Schedule 13D with the Securities and Exchange Commission ("SEC"), the American Stock Exchange, and Concord; (ii) disseminating an Offer to Purchase shares of common stock of Concord while concealing the true purpose of such offer and otherwise fraudulently withholding material information from Concord's shareholders and the investing public in connection with such Offer to Purchase; and (iii) causing the Board of Directors of Concord, all of whom are nominees of the individual defendants, to approve merger terms between AFW and Concord which will result in all shareholders of Concord other than AFW receiving \$3 per share for their common stock of Concord while AFW will become the sole shareholder of Concord.

- 19. As is more particularly set forth hereinafter, in furtherance of and pursuant to the aforesaid illegal plan, combination and conspiracy, on or about February 6, 1975 the individual defendants caused AFW to disseminate to the public shareholders of Concord and to the investing public an Offer to Purchase all of the outstanding shares of common stock of Concord held by members of the public, and, on or about February 12, 1975 the individual defendants caused Concord to file preliminary proxy material with the SEC relating to a special meeting of stockholders of Concord to vote on the aforesaid merger between AFW and Concord. The aforesaid plan, combination and conspiracy is, as more particularly set forth hereinafter, illegal in that, among other things it (i) violates the tender offer provisions of the Exchange Act, and particularly Sections 14(d) and 14(e) thereof; (ii) constitutes a device, scheme and artifice to defraud in violation of Section 10(b) of the Exchange Act; and (iii) further constitutes an illegal device, scheme and artifice which seeks to evade the requirements of Section 14(a) of the Exchange Act.
  - 20. Moreover, the Schedule 13D filed with the SEC and available to the investing public violates Sections 13(d) and 14(d) of the Exchange Act in failing to disclose the violations set forth in paragraph 19 and in failing to disclose the other material facts set forth below.

FIRST COUNT - DERIVATIVE CLAIM AGAINST DEFENDANTS AFW, ALVIN WEINSTEIN and FRANK WEINSTEIN

21. This Count is brough: by plaintiff derivatively on behalf of Concord against the individual defendants and AFW.

- 22. This Count arises under Sections 10(b), 13(d), 14(a), 14(d) and 14(e) of the Exchange Act, Rule 10b-5, and Regulation 14A.
- 23. The individual defendants, acting in concert, and together with the consent and connivance of defendant AFW, have engaged and participated in and are continuing to engage and participate in the fraudulent, illegal, and wrongful acts and transactions hereinafter alleged, to the damage and injury of Concord and its public common stockholders. In connection with the attempted purchase by AFW of common stock of Concord the individual defendants and AFW by the use of the means and instrumentalities of interstate commerce and of the mails:
- (a) employed and are continuing to employ devices, schemes and artifices to defraud;
- (b) made and are continuing to make untrue statements and representations of fact and omitted and are continuing
  to omit to state material facts necessary in order to make the
  statements and representations made in the light of the circumstances under which they were made, not false and misleading; and
- (c) engaged and are continuing to engage in acts, practices and a course of business conduct which operated and is continuing to operate as a fraud and deceit upon Concord and its public common stockholders.
- 24. The individual defendants realizing how well Concord had been prospering and would prosper, and for the purpose of usurping unto themselves the entire ownership of Concord, to the

deprivation of Concord and its public stockholders, and in furtherance of their aforesaid illegal plan, combination and conspiracy, artifically depressed the market price of shares of Concord common stock by (i) causing Concord to refrain from declaring any cash dividends, although Concord had and continues to have large sums of cash and other liquid assets which are unnecessary for its operation of business; and (ii) causing Concord to issue financial statements in which present ea nings were improperly understated or deferred.

- plan, combination and conspiracy, the individual defendants caused plan, combination and conspiracy, the individual defendants caused affw to be organized, transferred to AFW 1,226,549 shares of Concord's common stock theretofore held by them individually in exchange for all of the capital stock of AFW and then caused the boards of directors of Concord and AFW, over both of which they have control, to approve a merger of AFW into Concord pursuant to which (i) all outstanding shares of AFW would be converted into shares of common stock of Concord, (ii) all shares of common stock of Concord held by AFW would be cancelled; and (iii) holders of all other outstanding shares of common stock of Concord will receive, in lieu therefor, cash in the amount of \$3 per share.
  - (b) Since AFW holds approximately 68% of the common stock of Concord, the remaining shareholders of Concord could not vote down the proposed merger even if they were all to vote against it.
  - (c) The result of such a merger would be (i) the elimination of all'stockholders in Concord other than the individual defendants and (ii) the expenditure by Concord of millions of dollars for no legitimate business purpose.

- (d) Such a merger is generally called a "freezeout merger."
- 26. Notwithstanding the fact that the merger terms, as aforesaid, have already been approved by the boards of directors of Concord and AFW and further notwithstanding the fact that AFW holds approximately 68% of Concord's outstanding common stock and therefore has sufficient voting power to satisfy the voting requirements set forth in the New York Business Co poraton Law, the individual defendants and AFW were concerned then the merger might not be consummated upon the terms set forth in paragraph 25(a) for the following reasons:
- (a) The proposed merger would require that Concord disseminate a proxy statement to its shareholders pursuant to Section 14(a) of the Exchange Act. That proxy statement would have to contain the information required by Regulation 14A, and such information would include, among other things, the information required by Item 14 of Schedule 14A of Regulation 14A.
- (b) The information required by Item 14 of Schedule 14A would reveal, in glaring detail, the unconscionable conduct of the individual defendants in trying to freeze-out Concord's public shareholders at a price of only \$3 per share. Among other things, such information would make clear that while the public shareholders at to receive only \$3 for each share of Concord, the per share book value of the shares of Concord held by AFW will rise to approximately \$9.75 whereas the actual value of these shares will far exceed even that amount.
  - (c) The information required to be evealed in a proxy statement in connection with the proposed merger would, if

revealed, result in the fact that (i) the merger would be enjoined by the New York State Supreme Court as unlawful or fraudulent and/or (ii) an overwhelming majority of the public shareholders of Concord would institute appraisal proceedings in accordance with the provisions of the New York Business Corporation Law and receive, in lieu of \$3 per share of Concord the fair value thereof, which value exceeds \$9.75 per share.

- (d) The SEC has made known its distaste for freeze-out mergers and individual commissioners have gone so far as to voice the opinion that freeze-out mergers are illegal.

  Articles have appeared in the financial press describing the SEC's refusal to process and clear documents required to accomplish freeze-out mergers without lengthy and time-consuming investigations. The individual defendants and AFW were accordingly concerned that the SEC would delay for an indefinite time their ability to disseminate the proxy statement and thereby thwart their illegal plan, combination and conspiracy.
  - 27. In an effort to circumvent and evade the requirements of Section 14(a) of the Exchange Act and in furtherance of their aforesaid illegal plan, combination and conspiracy, the individual defendants and AFW embarked upon an illegal scheme to prevent the happening of the results set forth in paragraphs 26(c) and 26 (d). Thus, the individual defendants caused AFW to issue an "Offer to Purchase" shares of Concord, a copy of which is annexed hereto.
  - 28. The Offer to Purchase is false and misleading, contains untrue statements of material facts or omits to state material facts necessary in order to make the statements made not misleading, in the following respects, among others:

- (a) The Offer to Purchase does not contain the information required to be revealed in a proxy statement in connection with the proposed merger. Thus, by way of example only, the Offer to Purchase contains no financial statements of either Concord or AFW, contains no tabulation showing the existing and the pro forma capitalization of Concord, and does not set forth the benefits which will result to the individual defendants from the elimination of Concord's public shareholders.
- of the primary reasons for the Offer is to reduce the number of shareholders of Concord to less than 300 so that Concord's shares will be deregistered under the Exchange Act; that Section 14(a) thereof will no longer apply to Concord; that the information required by Regulation 14A would not have to be disseminated in connection with the freeze-out merger; and that the SEC will no longer have the ability to delay a freeze-out merger by investigating the accuracy of the information contained in the proxy statement before it is disseminated.
- (c) The Offer to Purchase does not state that the real reasons for the Offer, in view of the pending merger, are only to prevent the happening of the results set forth in paragraphs 26(c) and 26(d) and that there are no other reasons for the Offer to be made at this time.
- the purported opinion of Shearson Hayden Stone, Inc. ("Shearson") as to the fairness of the \$3 per share price is set forth, nor is

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any information given as to the compensation to be given to Sherson, as to who will pay such compensation, or as to the method by which Shearson arrived at its opinion.

- (e) No appraisals of any of Concord's assets are set forth.
- (f) No financial statements of AFW or of the individual defendants are set forth.
- (g) No statement is made concerning the amount of cash which Concord will ultimately expend in connection with the elimination of all its shareholders other than the individual defendants, and that such cash is not presently needed by Concord in the operation of its business and can, therefore, be used to pay dividends.
- (h) No statement is made that Concord's board of directors are under the domination and control of the individual defendants and that such Board accordingly did not exercise any independent judgment in approving the terms of the proposed merger.
- (i) No statement is contained advising that a shareholder of Concord who refrains from accepting the terms of the Offer and who seeks the fair value of his shares in an appraisal proceeding will obtain therein a sum greater than \$3 per share.
- 29. The said Offer to Purchase and the freeze-out merger upon the terms set forth in paragraph 25 will force Concord to become a purchaser of its common stock when it has no legitimate business reason to do so, and constitutes:

- (a) a waste and spoliation of Concord's assets for the role penefit of AFW and the individual defendants and is highly detrimental and unfair to Concord and its public common stockholders, and
- (b) a breach by the individual defendants and AFW of the fiduciary duty they owed to Concord and its stockholders.
- 30. Demand upon the Board of Directors of Concord to bring this action would be futile because the individual defendants are able to control and do control and dominate Concord's board of directors. Said defendants are the very individuals who profit from the wrongs herein alleged.
  - 31. Demand upon the chareholders of Concord to bring this action is unnecessary and would be futile because:
  - (a) under the law of New York, demand upon the shareholders is unnecessary;
  - (b) AFW owns such number of shares of Concord's common stock as gives it control of Concord;
  - (c) the wrongs alleged herein constitute a waste of Concord's assets and cannot be ratified by the shareholders of Concord.
    - 32. Plaintiff has no adequate remedy at law.

# SECOND COUNT - CLASS CLAIM AGAINST ALL DEFENDANTS

33. Plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 20 and 22 through 29 of this complaint.

- 34. This Count is brought by plaintiff on behalf of himself and all other members of the Class against all defendants.
- 35. This Count arises under Sections 10(b), 13(d), 14(a) 14(d) and 14(e) of the Exchange Act, and Rule 10b-5 and Regulation 14A.
- to purchase the shares of Concord held by its public shareholders is unreasonably low. Indeed, although the public had paid \$15.00 per share to Concord for 300,000 shares of stock in 1968 and \$20.00 per share to the individual defendants for 200,000 shares of stock in 1969, although plaintiff paid \$22.25 per share on the open market in 1969, and although Concord has earned, since the public offering, an aggregate amount well in excess of \$1.00 per share, AFW is "offering" under conditions of extraorlinary duress, to buy out the public for only \$3 per share. And even if the public refuses this offer, Concord has already agreed to freeze-out the public on the same price. In short, the defendants will acquire for themselves an interest in over \$2,000,000 of Concord's assets which rightfully belongs to the Class.
  - 37. By reason of the foregoing, defendants have violated Sections 10(b), 13(d), 14(a), 14(d) and 14(e) of the Exchange Act, Rule 10b-5 and Regulation 14A promulgated thereunder.
  - 38. Plaintiff and the Class have no adequate remedy at

# - THIRD COUNT - CLASS CLAIM AGAINST ALL DEFENDANTS

of the doctrine of pendent jurisdiction.

- 40. Plaintiff repeats and realleges all of the allegations contained in paragraphs 3 through 18, 24 through 29 and 36 of this acceptaint.
- 41. This Count is brought by plaintiff on behalf of himself and all other members of the Class against all defendants.
- 42. The purchase by AFW pursuant to the Offer to Purchase and the Plan entered into by defendants pursuant to which they are seeking to freeze-out and eliminate the public stockholders of Concord is a fraud by defendants upon the members of the Class and constitutes a willful violation by defendants of their fiduciary obligations to members of the Class in that:
- (a) the price of \$3 per share "offered" to the stockholders of Concord other than AFW is grossly unfair to the undeserved gain of AFW and the individual defendants;
- (b) the actions taken pursuant to the aforesaid illegal plan, combination and conspiracy reflect a clear abuse of trust, failure to exercise proper business judgment, and breach of fiduciary duties owned by defendants to the members of the Class; and
- (c) said plan is being accomplished by a false and deceptively incomplete and misleading Offer to Purchase and by the concealment of material facts relating to the value of the common stock of Concord.

FOURTH COUNT - DERIVATIVE CLAIM AGAINST DEFENDANTS AFW, ALVIN WEINSTEIN AND FRANK WEINSTEIN

43. This Court has jurisdiction of this Count by rea-

44. Plaintiff repeats and realleges all of the allegations contained in the First Count other than paragraph 22.

WHEREFORE, plaintiff demands judgment as follows:

- (a) that defendants be preliminarily and permanently enjoined from further solicitation of shares of common stock of Concord pursuant to the Offer to Purchase and from accepting any shares pursuant to said Offer or through open market purchases or from otherwise consummating the purchase of any shares of common stock of Concord;
- (b) that defendants be preliminarily and permanently enjoined from taking any further action toward or with a view
  to a merger between AFW and Concord upon terms which will divest
  Concord's public shareholders from an equity position in the
  surviving corporation;
  - (c) that the individual defendants and AFW Fabric Corp. account to Concord and the Class for all damages and injury sustained by Concord and the Class as a result of the fraudulent, illegal and wrongful acts and transactions complained of herein;
  - (d) that this Court declare the Second and Third Counts to be a class action pursuant to Rule 23, Federal Rules of Civil Procedure;
  - (e) that this Court grant such other and further relief as may be just and proper in the premises; and

(f) that this Court award to the plaintiff costs and disbursements of this action including reasonable fees to plaintiff's attorneys.

RUBIN BAUM LEVIN CONSTANT & FRIEDMAN

By Martin G. Office.

Attorneys for Plaintiff 598 Madison Avenue New York, New York 10022 (212) Pl 9-2700

STATE OF NEW YORK )
COUNTY OF Nassau )

ARNOLD MARSHEL, being duly sworn, deposes and says:

I am the plaintiff in this action. I have read the foregoing Amended Complaint and know the contents thereof to be true to my own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

- Tundel Marshell

Subscribed and sworn to before me this 8th day of March, 1975.

Martin a. Coleman

MARTIN A. COLEMAN Nessry Public, State is new York No. 30-7-51-Dushfind in Passey County Term Expres March 30, 1976

#### OFFER TO PURCHASE

All Outstanding Shares of Common Stock of
CONCORD FABRICS INC.

for Cash at \$3 Net Per Share
by AFW FABRIC CORP.

UNLESS EXTENDED, THIS OFFER WILL EXPIRE ON MARCH 5, 1975 AT 10:00 A.M., NEW YORK CITY TIME

February 6, 1975

To the Holders of Common Stock of Concord Fabrics Inc.

AFW FABRIC CORP., a New York corporation ("Purchaser"), hereby offers to purchase all of the outstanding shares of Common Stock, \$1 par value, of Concord Fabrics Inc., a New York corporation (the "Company"), at \$3 per share, net to the seller, in cash, subject to the terms and conditions set forth in this Offer and the related Letter of Transmittal.

The Purchaser is a recently organized New York corporation which, on February 5, 1975, acquired from Alvin Weinstein, Frank Weinstein, and seven trusts of which Frank Weinstein is trustee or a co-trustee, an aggregate of 1,226,549 shares, representing approximately 68%, of the Company's Common Stock. This stock was acquired solely in exchange for shares of the Purchaser's stock, all of which is owned by the Messrs. Weinstein and the trusts. Alvin Weinstein is Chairman of the Board and chief executive officer of the Company and Frank Weinstein is Chairman of the Executive Committee of the Company. They, and Joan (Mrs. Alvin) Weinstein, are the directors and officers of the Purchaser. (See Section 8—"Information Concerning the Purchaser; Purchaser's Interest in the Company").

It is the Purchaser's intention to return the Company to private ownership by the Weinstein family. Accordingly, as soon as practicable after this offer has expired, regardless of whether any shares are tendered to the Purchaser, the Purchaser intends to cause a merger of the Purchaser into the Company (or of the Company into the Purchaser) upon terms under which the shareholders of the Purchaser will receive or retain stock in the surviving corporation and the shareholders of the Company (other than the Purchaser) will receive cash of \$3 per share for the Company's Common Stock, which is the same price per share they will receive if they tender now to the Purchaser. The merger upon these terms has been approved by the Board of Directors of the Company, and since the Purchaser presently owns more than the required percentage of the Company's Common Stock to cause consummation of the merger under New York law, shareholders who do not now tender their shares will be unable to prevent the merger, which Purchaser expects will be consummated on or about April 1, 1975. The approval of the proposed merger by the Company's Board of Directors does not constitute any recommendation by the Board concerning this Offer.

A failure to tender under this Offer will thus result only in a deferral of the receipt of \$3 per share in cash for shares of the Company, except that shareholders who do not tender now and who are not in favor of the merger and comply with the provisions of New York law concerning appraisal proceedings will be entitled to exercise appraisal rights and to receive payment in cash of the "fair value" of their shares as determined in such proceedings. Purchaser believes that the fair value is no more than \$\frac{1}{2}\$ per share. The Board of Directors of the Company has received the opinion of Shearson Hayden Stone Inc. ("Shearson") that the fair value is \$3 per share. A predecessor of Shearson was the underwriter for the two public offerings of the Company's shares, and a member of Shearson's corporate finance department is the son of a director of the Company.

Any shareholder wishing to accept this Offer should either (1) complete the Letter of Transmittal or a facsimile thereof, sign it in the space provided, have his signature guaranteed, and forward it with his stock certificate(s) and any other required documents to the Tender Agent, or (2) request his broker, dealer, bank or trust company to effect the transaction for him.

Holders of Common Stock of the Company having shares registered in the name of a broker, dealer, bank or trust company are urged to contact such person if they desire to tender their shares.

- 1. Number of Shares. Subject to the terms and conditions set forth in this Offer and in the related Letter of Transmittal, the Purchaser will purchase all shares properly tendered by 10:00 a.m., New York City Time, on March 5, 1975.
- 2. Right of Withdrawal. Shares tendered pursuant to this OiTer may be withdrawn at any time prior to 5:00 p.m., New York City Time, on February 28, 1975. To be effective, notice of withdrawal must be received by the Tender Agent prior to such time and date. Any notice of withdrawal must specify the name of the person who signed the Letter of Transmittal depositing the shares to be withdrawn, the number of shares to be withdrawn and the name of the shareholder and certificate numbers shown on particular stock certificates evidencing shares to be withdrawn. Except as stated herein, tenders are irrevocable. Any shares withdrawn will be deemed not properly tendered for purposes of this Offer.
  - 3. Extension of Tender Period. The Purchaser expressly reserves the right, at its option, at any time or from time to time, to extend the period of time for which this Offer is open by notice of such extension to the Tender Agent; but in no event will the Offer be extended beyond April 4, 1975.
  - 4. Acceptance of Offer. To be properly tendered pursuant to this Offer, certificates for shares, together with a properly executed Letter of Transmittal and any other required documents, should be transmitted to and received by the Tender Agent at its address set forth below by 10:00 a.m., New York City Time on or before March 5, 1975 (or, if this Offer is extended as herein provided, by the time specified in such extension). Signatures on all Letters of Transmittal must be guaranteed by a commercial bank or trust company having an office or correspondent in New York City or by a firm which is a member of a national securities exchange. If certificates are registered in the name of a person other than the signer of the Letter of Transmittal, the certificates must be endorsed, or accompanied by stock powers signed by the registered owner, with the signature on the endorsement or stock power guaranteed as aforesaid. The method of delivery of certificates for shares is at the election and risk of the owner, but if sent by mail, registered mail, properly insured, is recommended.

For the convenience of holders of shares whose certificates are not immediately available, tenders may be made without the concurrent deposit of stock certificates if such tenders are made by or through members of any national securities exchange or the National Association of Securities Dealers. Inc., or by commercial banks or trust companies in the United States (collectively "Eligible Institutions"). In such cases the Letter of Transmittal, properly executed by the owner of the certificates, must be received by the Tender Agent prior to the expiration of this Offer, must contain the name of the shareholder, the number of shares tendered, the certificate numbers, if available, of such shares, and a guarantee executed by an Eligible Institution that such certificates will be delivered to the Tender Agent no later than business days after the expiration of this Offer.

If a shareholder desires to accept this Offer and time will not permit such shareholder's Letter of Transmittal to reach the Tender Agent before the expiration of this Offer, such tender may be effected if (i) a properly completed and executed Letter of Transmittal, together with any other documents required by the Letter of Transmittal, has been deposited with an Eligible Institution which executes the guarantee of delivery contained in such Letter of Transmittal, (ii) the Tender Agent has received prior to the expiration of this Offer a telegram or letter from such Eligible Institution setting forth the name and address of the shareholder, the number of shares tendered and the certificate numbers, if available, of the certificates representing such shares and stating that the Letter of Transmittal containing the guarantees of signatures and delivery referred to above, together with any other documents required by the Letter of Transmittal, has been so deposited and has been or will be immediately forwarded to the Tender Agent and (iii) such Letter of Transmittal and other documents are received by the Tender Agent within 8 business days after the expiration of this Offer.

in all cases payment for shares tendered and purchased pursuant to this Offer will be made only after deposit of the certificates therefor with the Tender Agent.

EXHIBIT TO AMENDED COMPLAINT - OFFER TO PURCHASE ALL OUTSTANDING SHARES OF CONCORD FABRICS, INC.

The delivery of the Letter of Transmittal and the acceptance of this Offer will constitute an agreement between the tendering shareholder and the Purchaser, in accordance with the terms of this Offer and the Letter of Transmittal, only when the properly signed Letter of Transmittal, or a telegram or letter (as provided above) from an Eligible Institution, is received by the Tender Agent.

By executing the Letter of Transmittal as set forth above, the shareholder irrevocably appoints designees of the Purchaser as proxies, to the extent of said shareholder's rights, effective when, and only to the extent that, the Purchaser purchases the shares tendered by such shareholder. To such extent, all prior proxies appointed by such shareholder will be revoked. Such designees will vote any shares as they in their discretion may deem proper at any annual, special or adjourned meeting of the Company's shareholders.

All questions as to the validity, form, eligibility (including time of receipt) and acceptance of any shares tendered will be determined by the Purchaser, which determination shall be final and binding. The Purchaser reserves the right to waive any of the conditions of this Offer or any defect in the tender of shares.

- 5. Payment of Purchase Price. Payment for any shares properly tendered and purchased pursuant to this Offer (including any extension hereof) will be made by the Purchaser as soon as practicable after the expiration of the Offer, but only against actual deposit of the certificates for the tendered shares with the Tender Agent. Certificates for any tendered shares not purchased by the Purchaser pursuant to Section 6 will be returned without expense to the tendering shareholders as soon as practicable following the withdrawal of this Offer. Subject to Instruction 5 of the Letter of Transmittal, the Purchaser will pay all stock transfer t-xes, if any, payable on the transfer of tendered shares, as well as all charges and expenses of the Tender Agent. Shateholders who tender shares pursuant to this Offer will not be required to pay any broker's commission or any related broker's fees on any shares purchased by the Purchaser.
- 6. Withdrawal of Offer; Conditions of Acceptance of Shares. The Purchaser shall not be required to purchase and pay for any shares properly tendered and may withdraw this Offer at any time prior to payment for any shares pursuant to this Offer if (i) there shall have been instituted or threatened any action or proceeding before any court or administrative agency by any government agency or any other person (a) which challenges or otherwise relates to the Offer, or the acquisition of the shares by the Purchaser or the proposed merger of the Company and the Purchaser, or (b) which, in the judgment of the Purchaser, might materially adversely affect the Company, or the Purchaser or its officers, directors or shareholders; or (ii) there shall have been declared any state of war or banking moratorium or suspension of business by banks in the United States or a general suspension of or limitation on prices for trading on the New York or American Stock Exchange, or (iii) there shall have been, in the judgment of the Purchaser, a material adverse change in the business, financial condition or operations of the Company.
- 7. Information Concerning the Company's Business. The Company was incorporated in New York in 1958 as a successor to a business founded in 1920. The business of the Company is developing, designing and styling woven and knitted fabrics of natural and synthetic fibers in a wide variety of colors and patterns, for sale to manufacturers of apparel and to retailers (including chains, department stores and independently owned fabric stores) for resale to the home sewing market.

Sales

Approximately 75% of fabric sales in each of the fiscal years ended September 2, 1973 and September 1, 1974 was to apparel manufacturers; the remaining 25% of fabric sales was to retail stores. Woven fabrics accounted for 72% of sales in fiscal 1974, compared with 75% in fiscal 1973. Knitted fabrics accounted for the remaining 28% of sales in fiscal 1974, compared with 25% in fiscal 1973.

The Company's sales have traditionally been highest from December through March because the Company sells principally cotton and synthetic woven fabrics, used primily in spring-summer apparel, and does not significantly employ wool, which is used in fall-winter apparel. Although the Company's sales were higher in February and March, 1974 than in any other two-morth period of the fiscal year ended September 1, 1974, the Company did not experience its traditional seasonal sales pattern throughout fiscal 1974, partly because of relatively higher wholesale sales during the first fiscal quarter (ended December 2, 1973) when customers were replenishing stocks depleted by shortages of woven fabrics experienced in fiscal 1973, and partly because of relatively higher retail sales in the fourth quarter resulting from the Company's increased efforts during the year to improve retail sales.

#### Production

All of the Company's woven fabrics are made from natural and synthetic fibers by independent contractors, who in many instances produce the greige goods in accordance with the Company's specifications. Independent finishing plants then print or dye and finish the greige goods, also in accordance with the Company's specifications.

The Company's Milledgeville, Georgia, knitting and finishing plant has about 60 knitting machines, producing about 70% of the Company's requirements of knitted fabrics; the balance is produced by independent contractors. The plant also contains equipment for finishing and dying the fabrics knitted at the plant and a large portion of the fabrics knitted by independent contractors for the Company. The plant has space available for additional knitting machines.

Due to shortages of woven greige goods, the Company experienced difficulty in obtaining adequate supplies of such goods caring most of fiscal 1973 and the first quarter of fiscal 1974. The shortages eased during the second quarter of fiscal 1974 and the Company is presently able to obtain adequate supplies of woven greige goods without difficulty.

#### Employees

The Company employs about 375 persons. In connection with the closing of the Company's North Bergen, New Jersey distribution center in August, 1973 (see "Property" below) and its Los Angeles warehouse in September 1973 the Company terminated the employment of the warehouse workers at those facilities. In Augus, 1973, District 65 of the Distributive Workers of America, the union which represented the warehouse employees and approximately 80 office personnel employed at the Company's principal office in New York, filed a complaint with the National Labor Relations Board, alleging an unfair labor practice by the Company, and in September, 1973 commenced a strike against the Company. In October, 1973 the National Labor Relations Board dismissed the union's complaint, and an appeal from the dismissal of the complaint was denied in April, 1974. The strike is still continuing, but to date at has not had a material adverse effect on the Company's business.

#### Property

The Company owns in fee a 3½ year old knitting and finishing plant consisting of at mately 110,000 square feet on one floor situated on approximately 60 acres of land in Milledgeville Georgia.

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The Company has a lease expiring in 1984 for one floor and a part of a second floor at 1411 Broadway, New York, New York, consisting of approximately 53,200 square feet, of which it uses 34,600 square feet for offices and showrooms. An aggregate of 18,600 square feet of the leased space which the Company no longer requires has been sublet for terms expiring in 1978 (1,700 square feet).

In April, 1971 the Company commenced using a distribution center, containing approximately 160,000 square (cet, in North Bergen, New Jersey, under a lease expiring in 1996. The Company

terminated its warehouse operations there in August, 1973 and disposed of the equipment located in the facility, but to date has not been successful in subleasing the space. In November, 1974 the Company surrendered its lease for the premises pursuant to an agreement with the lessor under which the Company will remain liable for the rent and expenses of maintaining the property until the expiration of the lease in 1996 unless certain conditions are met, including the reletting of the building for a minimum term of 10 years at a net annual rental of at least \$1.60 per square foot. Efforts to re-let the distribution center are continuing.

#### Competition

Many firms, no one of which is dominant, are in competition with the Company a price, product, quality and service. The Company is in competition both with firms whose function is limited to the conversion of greige goods and yarn into finished fabrics, and with integrated textile companies that manufacture, as well as convert, greige goods and yarns. The Company believes that it is one of the largest firms in the category of nonintegrated converters, but in the category of integrated firms there are a number of companies that have significantly larger sales and financial resources than the Company.

#### Financial Information

For the fiscal year ended September 1, 1974 the Company had sales of \$6,202,395 and net income of \$520,340 (\$.29 per share), compared with sales of \$63,709,104 and net frome of \$224,825 (\$.13 per share) for the prior year. Profits, although improved in fiscal 1974, continued to be adversely affected primarily by an additional loss provision for the closed New Tersey distribution center, and also by a larger provision than in the prior year for doubtful accounts, pressitated, in management's opinion, by the insolvency of several domestic customers and by the uncertain economic conditions prevailing at the end of fiscal 1974.

For the 13 weeks ending December 1, 1974 the Company had sales of \$15,199,286 and net income of \$15,482 (\$.01 per share), compared with sales of \$14,319,854 and net lacome of \$410,138 (\$.23 per share) for the 13 weeks ending December 2, 1973. The decrease in profits from the comparable prior period was primarily attributable to a reduction in the gross profit margin from 23.9% to 17.7%, which, in management's opinion, was caused principally by a mark-down of knit and woven inventories to reflect lower replacement costs during the period and also by a general weakness in selling prices due to severe competition and customer resistance to prices. The results of operations for each 13 week period may not be indicative of the operating results for a full fiscal year because of the seasonal nature of the business (see "Sales" above).

For the second quarter of fiscal 1974 (i.e., the 13 weeks ended March 3, 1974) the Company's sales, net income, and net income per share were \$14,865,078, \$165,567 and \$.09, respectively. Income for this period was adversely affected by lower profit margins on sales and by a loss provision of \$200,000 (before tax benefit) in connection with the closed North Bergen, New Jersey distribution center. For the first two months of the second quarter of the current fiscal year (i.e., December, 1974 and January, 1975) the Company's sales were running approximately 25% higher than in the comparable period in fiscal 1974, and in December, 1974 net income appears to have been sharply higher than in December, 1973; a further provision of approximately \$90,000 (before tax benefit) will be required in the current quarter, as a result of the Company's inability to rent the North Bergen distribution center. Accordingly, net income for the current quarter is expected to be substantially higher than net income for the second quarter of fiscal 1974.

As of September 1, 1974 and December 1, 1974 the book value per outstanding share of the Company's Common Stock was \$7.61 and \$7.62, respectively.

Reference is made to the Company's Annual Report to Shareholders for fiscal 1974 and Interim Report to Shareholders for the 13 weeks ending December 1, 1974 for further financial information about the Company.

#### Dividends

In 1968, the Company paid two quarterly dividends of \$.10 per share and in 1969 four quarterly dividends of \$.10 per share (before adjustment for the stock dividend) and a 10% stock dividend were paid. In 1970, one quarterly dividend of \$.10 per share was paid. No dividends have been paid since 1970. Under a Note Agreement with The Prudential Insurance Company of America, cash dividends on the Company's stock after December 29, 1968 may not exceed 70% of net earnings since that date, on a cumulative basis; as at September 1, 1974 approximately \$900,000 of dividends would be permitted by the and Agreement; the Note Agreement also contains minimum working capital requirements. Future payment of dividends will depend upon the Company's earnings, financial condition and other relevant factors.

#### Price Range of Common Stock

The price range of the Company's Common Stock since July 11, 1968 (the date it became publicly held) is set forth below. The prices prior to June 25, 1969 are based on hid prices (adjusted for a stock dividend of 10% on March 27, 1969) in the over-the-counter market as reported by National Quotation Bureau, Incorporated and represent prices between dealers which neither represent actual transactions nor include retail markups, markdowns or commissions. Beginning June 25, 1969, the prices represent sales on the American Stock Exchange.

	High	Low
July 11—December 31, 1968	233/4	131/8
January 2—June 24, 1969	25	171/2
June 25—December 31, 1969	21	121/2
1970	14	37/8
1971	131/4	43/4
1972	81/8	35/8
1973	,,,	0/8
First Quarter	51/4	31/2
Second Quarter	4	23/8
Third Quarter	41/4	23/8
Fourth Quarter	3	11/2
1974		
First Quarter	31/4	. 15%
Second Quarter	23/4	11/2
Third Quarter	13/4	13/8
Fourth Quarter	15%	1
1975		
January 2—January 31	134	11/8
February 3-4	21/8	134
	-/8	194

On February 6, 1975, the Purchaser announced that this Offer would be made. On February 3 and 4, 1975, the last two full trading days prior to such announcement, the closing price of the Common Stock on the American Stock Exchange was \$21/8.

#### Prior Public Offerings

In July, 1968, the Company made an initial public offering of 300,000 shares of Common Stock at a price of \$15 per share. Net proceeds to the Company from this offering were approximately \$4,100,000.

In June, 1969, Alvin Weinstein and Frank Weinstein sold publicly 100,000 shares each of the Company's Common Stock at a price of \$20 per share. Net proceeds to the Messrs. Weinstein were approximately \$1,850,000 each. The Company received none of the proceeds from this sale.

#### Further Information

The Company is presently subject to the information filing requirements of the Securities Exchange Act of 1934, and in accordance therewith files periodic reports, documents and other information with the Commission relating to its business, financial statements and other matters. Information, as of particular dates, concerning the Company's directors and officers, their remuneration, options granted to them, the principal holders of the Company's securities, and any material interest of such persons in transactions with the Company is disclosed in such periodic reports and other documents. Such reports, documents and other information may be inspected at the Commission's office at 1100 L Street, N.W., Washington, D. C., and copies may be obtained upon payment of the Commission's customary charges by writing to the Commission's principal office, 500 North Capitol Street, N.W., Washington, D. C. 20549.

8. Information Concerning the Purchaser; Purchaser's Interest in the Company. The Purchaser, a New York corporation, was organized in January, 1975 for the purpose of making this Offer and then causing a merger of the Purchaser and the Company. In February, 1975, the Purchaser acquired all of the shares of the Company's Common Stock owned by Messrs. Weinstein and seven trusts of which Frank Weinstein is trustee or co-trustee (in one trust he is also the income beneficiary and in the other trusts the children of Alvin Weinstein have remainder interests) in exchange for shares of the Purchaser's Common Stock. As a result of this exchange, the Purchaser now owns 1,226,549 shares of the Company's Common Stock representing approximately 68% of the outstanding shares, a sufficient number of shares, even if no shares are tendered pursuant to this Offer, to approve a merger of the Purchaser and the Company. Except for this exchange of shares, neither the Purchaser nor any of its officers and directors have effected any transactions in the Company's stock during the preceding 60 days.

The Messrs. Weinstein and the trusts are the sole shareholders of the Purchaser; Alvin Weinstein owns 611,147 shares of Purchaser's stock, Frank Weinstein owns 611,024 shares and the trusts own an aggregate of 4,378 shares (Frank Weinstein may also be considered to own beneficially 2,200 shares held by the trust of which he is a trustee and the income beneficiary). The Messrs. Weinstein and Joan (Mrs. Alvin) Weinstein are the directors of the Purchaser; Alvin Weinstein is the President and Treasurer and Frank Weinstein is Vice President and Secretary of the Purchaser. The Purchaser's business address is 4 Forte Drive, Old Westbury, New York 11568. Alvin Weinstein's present principal position is Chairman of the Board and chief executive officer of the Company; Frank Weinstein's present principal position is Chairman of the Executive Committee of the Company; Joan Weinstein's present principal position is doing promotional and marketing work for the Company. The principal business address of the Messrs, and Mrs. Weinstein is 1411 Broadway, New York, New York 10018. Of the trusts, six are under Indentures dated December 24, 1968 of which Alvin Weinstein is the grantor; each owns 363 shares of the Purchaser's stock; Frank Weinstein and Joan Weinstein are co-trustees; the income beneficiaries are Alvin Weinstein Foundation, Inc. and two public charities and the remainder interest in each is held by one of Alvin Weinstein's children (namely, Peter, Jonathan, Marc, David, Abbe and Michael). The last trust is under an Indenture dated December 19, 1968, of which Frank Weinstein is the grantor, trustee and income beneficiary; it owns 2,200 shares of the Purchaser's stock. The address of each trust is c/o Frank Weinstein, trustee or co-trustee, 40 West 10th Street, New York, New York 10011.

29. Purpose of this Offer. The purpose of this Offer, and the contemplated merger of the Purchaser and the Company after the expiration of the Offer, is to return the Company to the status of a privately-held corporation owned by the Weinstein family. Although the Company's shares were well received when the Company went public in 1968 and when the Messrs. Weinstein sold shares in 1969, in recent years the Company's stock has not been actively traded. For example, there were no sales of the stock on the American Stock Exchange on 113 of the 277 trading days since January 2, 1974 and the average daily trading volume on the days when the shares did trade was 503 shares.

The Company thus does not afford its shareholders the advantage of an active trading market—and therefore liquidity—for their shares, and by becoming a private company it may be offering its public

shareholders an opportunity to receive a cash price for all of their shares which is more than might be obtainable in the near future in the public market for any significant number of shares. At the same time the Weinstein family would gain the opportunity to operate the business without the expense or other possible disadvantages of a public company.

10. Source and Amount of Funds. The Purchaser obtained the 1,226,549 shares of the Company's Common Stock in exchange for shares of the Purchaser's Common Stock.

The funds to purchase the shares tendered pursuant to this Offer will be borrowed by the Purchaser from Chemical Bank and Manufacturers Hanover Trust Company under a short term loan bearing interest at a rate of 34 of 1% over the prime rate. The Messrs. Weinstein have personally guaranteed the contemplated loan to the Purchaser. Upon the merger of the Purchaser and the Company, this loan will become the obligation of the surviving corporation as part of its short term borrowings under the lines of credit referred to in the next paragraph.

The funds to pay for the Company's shares which, upon the contemplated merger between the Purchaser and the Company, will be converted into cash will be provided by additional short term borrowings under the Company's lines of credit from Chemical Bank, Manufacturers Hanover Trust Company and Irving Trust Company, bearing interest at rates of ½ to ½ of 1% over the prime rate. In order to effect the contemplated transactions, the consent of The Prudential Insurance Company of America under a Note Agreement is required; such approval has been obtained.

- 11. So icitation and Other Fees. The Purchaser will not pay any fees to any broker, dealer, bank or trust company for soliciting tenders pursuant to this Offer. The Purchaser will, however, reimburse such persons for their out-of-pocket expenses in forwarding this Offer to the beneficial owners of the shares and in forwarding certificates for shares together with Letters of Transmittal to the Tender Agent.
- 12. American Stock Exchange Listing Status; Registration under the Securities Exchange Act of 1934. If Purchaser acquires 359,183 or more of the Company's shares or if a sufficient number of shareholders tender their shares under this Offer, the American Stock Exchange may delist the Company's shares. Published guidelines of the Exchange indicate that it would consider delisting the shares if the number of publicly held shares becomes less than 200,000, if the total number of shareholders of record becomes less than 600, or if the number of holders of 100 shares or more becomes less than 400. If the Company's shares are delisted by the American Stock Exchange and if the number of shareholders of record becomes less than 300, then the shares may be deregistered under the Securities Exchange Act of 1934 and the Company will no longer be required to file reports with, or comply with the proxy rules of, the Securities and Exchange Commission.
- 13. Taxes. The Purchaser has been advised by its counsel that the Federal income tax consequences of the merger will be as follows:

The tender of the Company's stock for eash pursuant to the Offer will be treated as a sale of stock. A tendering shareholder (other than a dealer in the Company's stock) will recognize capital gain or loss measured by the difference between such shareholder's cost or other basis for the Company's stock and \$3. The gain or loss will be long-term if the holding period is in excess of six months.

Under provisions added to the Internal Revenue Code by the Tax Reform Act of 1969 a portion (one-half in the case of individuals) of long-term capital gain will constitute an item of tax preference. A shareholder's items of tax preference may be subject to a minimum tax which, in the case of individuals, is generally equal to 10% of the amount, if any, by which all of the shareholder's items of tax preference for the taxable year exceed the sum of \$30,000 plus the Federal income tax otherwise payable in respect of

such taxable year and certain amounts of Federal income tax paid in respect of prior taxable years that ended after December 31, 1969 and not offset against items of tax preference for prior taxable years. Furthermore, to the extent that the amount of a shareholder's items of tax preference for the taxable year (or average items of tax preference for the taxable year and the preceding four taxable years) exceed \$30,000, the amount of the shareholder's income which qualifies for the 50% maximum rate on earned income will be reduced.

In 1974, the House Ways and Means Committee reached certain tentative conclusions concerning an extensive revision of the minimum tax effective for taxable years beginning after 1974. It is not clear to what extent, if any, the current Congress will act to amend the minimum tax provisions and whether such legislation would apply to transactions occurring before its enactment.

Shareholders should consult their own tax advisers as to the Federal, state, local or foreign tax consequences to them of the merger. .

14. Miscellaneous. This Offer is not being made to, nor will the Purchaser accept tenders from, holders of the Company's shares in any jurisdiction in which this invitation or the acceptance thereof would not be in compliance with the securities or blue sky laws of such jurisdiction. This offer is not being made to, and tendered shares will not be accepted from, shareholders residing in any jurisdiction whose securities laws require this Offer to be made by a licensed broker or dealer.

No person has been authorized to give any information or to make any representation on behalf of the Purchaser other than as contained in this Offer and in the Letter of Transmittal, and, if any such information or representation is given or made, it must not be relied upon as having been authorized.

The Purchaser reserves the absolute right to reject any and all tenders not in proper form or to waive any irregularities or conditions of tender, and the Purchaser's interpretation of the terms and conditions of this Offer (including the instructions on the back of the Letter of Transmittal) will be final.

The Purchaser has filed with the Securities and Exchange Commission, 500 North Capitol Street, N.W., Washington, D. C. 20549, material pursuant to Rule 13d-1 and Rule 14d-1 of the General Rules and Regulations under the Securities Exchange Act of 1934 furnishing certain information with respect to this Offer and the contemplated marger. Copies of such material may be obtained from the Commission upon payment of the Commission's customary charges.

The Letter of Transmittal and certificates for your shares should be sent or delivered by you, your broker, dealer, bank or trust company to the Tender Agent at the address set forth below. Requests for additional copies of this Offer and of the Letter of Transmittal may be directed to the Tender Agent. Facsimile copies of the Letter of Transmittal will be accepted.

Send Letters of Transmittal and certificates to the Tender Agent at:

Mailing Address	Delivery Address
	Chemical Bank
Corporate Agency Division	Corporate Tellers Window
P. O. Box 25969	ger 2nd Floor-North Building
Church Street Station	55 .Water Street
New York, N. Y. 10249	New York, N. Y.
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Harold R. Tyler in Room 36 of the
, Foley Square, New York, New York, on

75, at 2:15 O'clock in the afternoon of
reafter as counsel can be heard, for an

\$5 of the Federal Rules of Civil Procedure,
hjunction enjoining defendants AFW Fabric

I Fabrics, Inc. ("Concord") during the
ion from consummating a merger of defenas referred to in the Offer to Purchase of
February 6, 1975, and the press release issued

by defendant Concord on March 3, 1975, and for such other, further or different relief as to this Court may seem just and proper.

Dated: New York, New York March 11, 1975

Yours, etc.,

RUBIN BAUM LEVIN CONSTANT & FRIEDMAN

By Manter a. Coleman A Member of the Firm

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1. TO:

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Concord Fabrics, Inc.
425 Park Avenue
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(212) PL 9-8400

AFW Fabric Corp. c/o Alvin Weinstein Concord Fabrics, Inc. 1411 Broadway New York, New York

Alvin Weinstein
c/o Concord Fabrics, Inc.
1411 Broadway
New York, New York

Frank Weinstein
c/o Concord Fabrics, Inc.
1411 Broadway
New York, New York

AFFIDAVIT OF MARTIN A. COLEMAN IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ARNOLD MARSHEL,

Plaintiff,

AFFIDAVIT IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

-against-

AFW FABRIC CORP., CONCORD FABRICS, INC., ALVIN WEINSTEIN and PRANK WEINSTEIN,

75 Civ. 1018

Defendants.

STA L OF NEW YORK )

COUNTY OF NEW YORK)

MARTIN A. COLEMAN, being duly sworn, deposes and says:

1. I am a member of the firm of Rubin Baum Levin Constant & Friedman, attorneys for plaintiff herein. I respectfully submit this affidavit in support of plaintiff's motion for a preliminary injunction enjoining and restraining defendants AFW Fabric Corp. ("AFW") and Concord Fabrics, Inc. ("Concord") during the pendency of this litigation from consummating a merger of defendants AFW and Concord as referred to in the Offer to Purchase of defendant AFW dated February 6, 1975, and the press release issued by defendant Concord on March 3, 1975. A copy of the Offer to Purchase is annexed as an exhibit to plaintiff's Verified Amended Complaint which, in turn, is annexed hereto as Exhibit A. Annexed hereto as Exhibit B is a copy of the press release issued by defendant Concord on March 3, 1975.

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2. The announced merger, and the resolutions of Concord's Board of Directors in connection therewith, are part and parcel of a plan and scheme by the individual defendants herein, alvin Weinstein and Frank Weinstein, to freeze out the public shareholders of Concord and usurp for themselves the entire ownership of Concord. Unless a preliminary injunction is granted, the merger, upon the terms announced, will be consummated and Concord will cease to be a publicly-held corporation. Accordingly, the instant motion is being made both derivatively, on behalf of Concord, as well as on behalf of the public shareholders thereof.

#### THE FACTS

3. Concord is a New York corporation which, prior to July 1968, was privately held. The individual defendants owned substantially all of its outstanding stock. In July 1963, pursuant to a registration statement and prospectus, Concord sold to the public 300,00° shares at an offering price of \$15 per share. One year later, in July 1969, the individual defendants sold an additional 200,000 shares to the public at a price of \$20 per share. Thus before expenses of the sale, Concord had received approximately \$4,500,000 from the public and the individual defendants had received an additional \$4,000,000 from the public. After these sales, the individual defendants were left with approximately 68% of Concord's issued and outstanding stock. There can be no serious dispute concerning the absolute domination and control of Concord's Board of Directors by the individual defendants. Both

are directors of Concord and, additionally, Alvin Weinstein is Chairman of the Board of Directors and Frank Weinstein is Chairman of the Executive Committee.

- 4. (a) In its July,1968 prospectus, Concord disclosed a net worth as of March 31, 1968 of \$6,838,341. At that time it had 1,320,000 shares outstanding so that the book value for each share was approximately \$5.18. Concord's current assets were listed at \$18,565,039 and its current liabilities were listed at \$12,213,460. Accordingly, its ratio of current assets to current liabilities was 1.52 to 1.
- (b) After its public offering, Concord's financial position was, of course, \*ignificantly improved. Thus, its reported net worth as of December 29, 1968 was \$12,221,290. At that time it had 1,781,871 shares outstanding so that the book value for each share was approximately \$6.85. Its current assets were listed at \$26,514,338 and its current liabilities were listed at \$14,915,458. Accordingly, its ratio of current assets to current liabilities was 1.77 to 1.
- (c) In the ensuing years, Concord has prospered. In its most recent annual report for the year ended September 1, 1974 Concord reported a net worth of \$13,597,970. It then had 1,785,731 shares outstanding so that the book value for each share had risen to \$7.61. Its current assets were listed at \$29,696,160 and its current liabilities were listed at \$12,669,825. Accordingly, its ratio of current assets to current liabilities was 2.34 to 1.

It is interesting to note that Concord's current liabilities as at September 1, 1974 were approximately the same as they were prior to its public offering in July, 1968. However, Concord's current assets had <u>increased</u> by over \$11,000,000.

- traded recently at unduly low prices. The complaint alleges that one factor for the depressed prices has been the scheme of the individual defendants to contribute to this result by not permitting Concord to declare dividends although it is obviously cash rich.) In any event, it is a matter of public knowledge that stocks in general are currently trading at depressed prices. Many of Concord's shareholders, including plaintiff, have enough faith in the economy to expect an eventual recovery in the prices for Concord's common stock. Thus, plaintiff herein, who purchased his 500 shares of Concord on the open market in January, 1969 at a price of \$22.25 per share plus brokerage commissions and has ret ined such shares ever since has no desire to be summarily "frozen out" of his stock ownership.
- 6. The plan and scheme which the individual defendants conceived is based upon the fact that Section 903(a)(2) of the New York Business Corporation Law permits a domestic corporation such as Concord to merge, after a plan of merger has been adopted by its Board of Directors, upon a vote of the holders of two-thirds of all outstanding shares. Since the individual defendants cwn 68% of Concord's outstanding shares they created a scheme for forcing a "merger" which has no purpose other than freezing out the public at \$3 per share.

- . 7. Since a merger requires two corporations, the individual defendants formed AFW during January 1975, and transferred their Concord stock to AFW in exchange for all the AFW stock.

  AFW is not engaged in any business. It was created for the sole purpose of providing the vehicle which the individual defendants would employ for eliminating the public shareholders of Concord.
- 8. After AFW was organized, the individual detendants caused the Concord Board of Directors to approve merger terms between AFW and Concord pursuant to which (i) all outstanding shares of AFW would be converted into shares of Concord, (ii) all shares of Concord held by AFW would be cancelled, and (iii) the holders of all other outstanding shares of Concord common stock would receive, in lieu therefor, cash in the amount of \$3 per share.
- 9. At the same time that the directors approved the merger terms, the individual defendants arranged for AFW to obtain short-term loans from Concord's banks so that AFW could implement a tender offer for shares of Concord at the same \$3 per share price. It was, of course, intended that AFW would never have to repay these borrowings. Rather, upon its merger into Concord, Concord would assume the obligation.
- and was to expire on March 5, 1975 unless extended. In the tender offer, AFW advised the Concord shareholders that the forthcoming merger was a foregone conclusion and that the only difference between accepting the offer of \$3 per share, or waiting for the merger and receiving \$3 per share at that time, was that

AFFIDAVIT OF MARTIN'A. COLEMAN IN'SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

appraisal rights would be available for dissenting shareholders on the merger. The Board of Directors of Concord, all of whom are nominees of the individual defendants, approved the terms of the merger in connection with the tender offer. Without such approval, the tender offer could not have been made since AFW could not have arranged to borrow the necessary funds from Concord's banks. Having caused Concord's Board of Directors to adopt the merger resolutions, defendants were able to coerce and intimidate Concord's public shareholders in the tender offer by stating:

"The merger upon these terms has been approved by the Board of Directors of the Company, and since the Purchaser presently owns more than the required percentage of the Company's Common Stock to cause consummation of the merger under New York law, shareholders who do not now tender their shares will be unable to prevent the merger, which Purchaser expects will be consummated on or about April 1, 1975."

11. Plaintiff commenced this action on February 28, 1975 and on that day obtained an order to show cause returnable March 4, 1975 in which he sought to enjoin the consummation of the tender offer. In his supporting memorandum of law and affidavit plaintiff argued that the tender offer was patently fraudulent. Why .... 12/27 1 1 . . · . \_: : · · . . would AFW go through the not inconsiderable expense of making a -: " tender offer after the Concord Board of Directors had already : 110. .. 1:7: Line:/ inversel. ,1: t agreed to a merger at the same price contained in the offer? The The control of the co offer was surely not being made to ensure that there would be sufficient votes for the merger, for AFW already owned more than twoent appointment the tries of the son chart, or westing . to memory and recogning \$5 per share at that time, was that

AFFIDAVIT OF MARTIN A. COLEMAN IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

thirds of Concord's stock. As argued by plaintiff in support of his order to show cause, the purposes of the offer (none of which were disclosed therein) were as follows:

- a) to reduce the number of shareholders of Concord to less than 300 so that Concord could then deregister its stock from the Exchange Act pursuant to Section 12(g)(4) thereof and accordingly dispense with the need to distribute in connection with the merger a proxy statement or its equivalent as mandated by Sections 14(a) and 14(c) of the Exchange Act;
- b) to permit the individual defendants after deregistration, to push through their merger without the need to make the disclosures required by Regulation 14A and Schedule 14A, which in turn, would lessen the number of shareholders who would demand appraisal rights and would also remove the proxy statement from the scrutiny of the Securities and Exchange Commission; and
- c) to lessen the number of shareholders who would be able to seek appraisal rights, even if a proxy statement ultimately had to be disseminated, by obtaining as many shares as possible on a tender offer which was devoid of relevant, material facts and which misled the public into believing that the \$3 per share price was fair when, in fact, such price was egregiously unfair.
- 12. None of the foregoing matters were disclosed in the offering materials. Similarly, the offer contained no financial statements of Concord nor pro-forma tabulations nor much of the other information required by Schedule 14A.
- 13. Plaintiff argued in support of his motion to enjoin the tend offer that the tender offer was an integral part of defendants' scheme to freeze out the public shareholders of Concord and violated a multitude of provisions of the Exchange Act, including Sections 10(b), 13(d), 14(a), 14(d) and 14(e). In the

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face of plaintiff's motion to enjoin the consummation of the tender offer, defendants capitulated and called it off. Notwithstanding the time and expense which they had devoted to their tender offer, which was first made on February 6, 1975, they withdrew it on March 3, 1975 rather than appear before this Court on March 4, 1975 and attempt to justify their conduct. However, the press release in which they announced their termination of the tender offer (Exhibit B hereto) stated that they were proceeding with their plans to consummate the merger of AFW into Concord on the terms mentioned above.

by Concord's Board of Directors are fraudulent and that any merger between Concord and AFW upon the terms approved by Concord's directors would be an illegal merger in violation of the provisions of the Exchange Act as well as state law. These merger resolutions were an integral part of defendants' illegal tender offer. Without those merger resolutions, AFW would not have been able to arrange for borrowings with which to make its tender offer nor, of course, would it have been able to coerce and intimidate Concord's shareholders by telling them that the merger was a foregone conclusion. Moreover, a proposed merger which has no reason other than freezing out and eliminating the public shareholders of Concord would be a perversion of the state statutes permitting mergers. Such a merger would be a sham and a fraud.

15. Unless this Court enjoins the consummation of the merger pending the trial of this matter, both Concord and its

AFFIDAVIT OF MARTIN A. COLEMAN IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

public shareholders will suffer irreparable harm. Concord will cease to be a public corporation and will have illegally been forced to expend over \$1,500,000 for no conceivable business purpose. Its public shareholders will have been forced to give up their stockholdings and their pro rata interest in Concord when there was no business reason for them to do so. Under the circumstances, it is submitted that this Court should grant an injunction enjoining the consummation of a merger between Concord and AFW pending the trial of this matter.

16. No previous application has been made for the relief requested herein.

Sworn to before me this 11th day of March, 1975

GLORIA J. HOPN
Notery Public, Stom of New York
No. 24.2047423
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Commission Explan Month 30, 1875

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March 3, 1975

Concord Fabrics Inc. (AMEX) today announced that on Friday evening, February 28, 1975, it was notified that a shareholder had commenced an action in the United States District Court for the Southern District of New York seeking to enjoin the tenasr offer by AFW Fabric Corp. for Concord's stock, and that a motion for a preliminary injunction had been scheduled for argument on Tuesday afternoon, March 4, 1975. The tender offer at \$3 per share had been commenced on February 6, 1975 and was to expire at 10:00 a.m., New York City time, on March 5.

AFW was withdrawing the tender offer pursuant to Section 6 of its Offer to Purchase dated February 6, 1975, which provides that AFW may withdraw the offer at any time prior to payment for the Concord shares if an action shall have been instituted challenging the tender offer. Certificates for the Concord stock already tendered will promptly be returned by mail.

Concord and AFW also stated that they are proceeding with the previously announced proposal for the merger of AFW into Concord. Concord stated that on February 12, 1975 it had filed preliminary proxy material with the Securities and Exchange Commission relating to a special meeting of stockholders of Concord scheduled for April 3, 1975 to vote on the

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EXHIBIT TO AFFICAVIT - PRESS RELEASE ISSUED BY CONCORD FABRICS, INC.

merger; it is anticipated that a definitive proxy statement will be mailed to stockholders by the end of next week.

Under the terms of the proposed merger, Concord stockholders

(other than AFW) would receive \$3 per share in cash and Alvin and Frank Weinstein, the stockholders of AFW and the Chairman of the Board and Chairman of the Executive Committee of Concord, would re

Concord stock. As a result of the merger, Concord will become a privately-held corporation owned entirely by the Weinsteins. AFW presently owns 68% of Concord's outstanding stock.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ARNOLD MARSHEL,

Plaintiff, ::

75 CIV 1018 HRT

- against -

: AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

AFW F BRIC CORP., et al.,

Defendants.

STATE OF NEW YORK )

COUNTY OF NEW YORK )

SIDNEY J. SILBERMAN, being duly sworn, deposes and says:

- 1. I am a member of the firm of Kaye, Scholer, Fierman, Hays & Handler, and am duly admitted to practice before this Court. I submit this affidavit in opposition to plaintiff's motion for a preliminary injunction enjoining defendants AFW Fabric Corp. ("AFW") and Concord Fabrics Inc. ("Concord") from consummating a proposed merger of AFW into Concord, designed to return Concord to private ownership by the Weinstein family.
- 2. As will appear below, there is really no factual issue presented by this motion for a preliminary injunction. There is no material misrepresentation or omission of any kind in the Concord Proxy Statement (Exhibit 4 hereto) which was furnished to stockholders in connection with the merger. The sole federal question presented, therefore, is whether the proposed merger, solely because

under its terms all shareholders will receive either the \$3 per share in cash provided for, or the "fair value" of their shares as judicially determined in appraisal proceedings under \$ 623 of the New York Business Corporation Law, will violate Rule 10b-5. We show in our brief that under the well-settled law in this Circuit the merger under such circumstances does not violate Rule 10b-5. This means that there is no pendent jurisdiction to consider state law questions, but we nevertheless also show in our brief that the merger is valid under the New York statutes as interpreted by the New York courts.

In addition, we show in our brief that the existence of any business purpose is not an issue here, and that any inquiry into the question of business purpose is irrelevant. As a matter of required disclosure, the Proxy Statement states that the purpose of the merger is to return Concord to private ownership by the Weinstein family, which will enable the Weinsteins to operate it without public scrutiny and solely with regard to their own interests, and also sets forth the benefits of the merger to the Weinstein family (Proxy Statement, pp. 1 and 4). The return of Concord to private ownership will in fact produce certain business advantages (such as eliminating certain printing, mailing, legal, accounting, and other expenses involved in being a public company, and avoiding the necessity for executives to devote time to such matters as stockholder relations, discussions with security analysts, and preparation of annual reports and the like), but since as a matter of law business purpose is irrelevant,

defendants do not assert on this motion that there was any purpose of the merger other than to return Concord to private ownership by the Weinstein family.

#### The Events Leading Up To This Motion

- ship by the Weinstein family was announced in a press release on February 6, 1975, and was described in a Wall Street Journal article on February 7th. The first step was a tender offer made on February 6, 1975 by AFW (which the Weinstein family had formed for the purpose and which had acquired the family's 68% of the Concord stock) for the remaining Concord shares at \$3 a share; the offer was to expire on Wednesday morning, March 5. The second step was to be the merger of AFW into Concord on or about April 1, 1975, upon terms under which the Concord stockholders would also receive cash of \$3 a share. (A copy of the Wall Street Journal article is annexed hereto as Exhibit 1).
- 4. On February 6, 1975, AFW duly filed with the Securities and Exchange Commission ("SEC"), the American Stock Exchange and Concord, a Schedule 13D pursuant to Sections 13(d) and 14(d) of the Securities Exchange Act of 1934 ("the 1934 Act"), reporting AFW's ownership of the Concord stock it had acquired the preceding day from the Weinstein family, and giving the required information concerning the tender offer. A copy of Schedule 13D, to which the Offer To Purchase ("tender offer") was attached as Exhibit I, is annexed hereto as Exhibit 2. The Schedule 13D was reviewed on the following day by the staff of the

SEC and no amendments thereof were required.

5. On Friday afternoon, February 28th, plaintiff commenced this action, and, by order to show cause returnable on Tuesday afternoon, March 4th, moved for a preliminary injunction against consummation of the tender offer. The motion was based essentially on the charge that the tender offer was designed to enable Concord to evade the SEC's proxy rules in connection with the proposed merger, and was therefore fraudilent. This charge was wholly unfounded, in law and fact. As a matter of law, de-registration of Concord's stock under the 1934 Act could not have been accomplished between the March 5th expiration date of the tender offer and the early April date scheduled for the merger.\* As a matter of fact -- as plaintiff's counsel could have ascertained by a telephone call -- Concord fully intended to comply with the proxy rules, and had on February 12, 1975 filed its preliminary proxy material with the SEC. Thus, two weeks prior to the institution of this action Concord had performed the very act which the complaint alleged it was attenting to evade. The definitive proxy statement was mailed on March 17th, as described in ¶ 8, below.

Rule 12d2-2 under the 1934 Act permits a withdrawal from listing and registration on an exchange only by order of the SEC upon application by the exchange, or by the issuer in accordance with the rules of the exchange. Rule 18 of the American Stock Exchange requires the issuer to submit detailed reasons in support of such an application, and authorizes the Exchange to require 15 days prior notice to all stockholders. After the issuer complie with the procedure of the Exchange, and files an application with the SEC, the SEC is required to publish notice of the application in the Federal Register and to give all interested persons an opportunity to submit written comments; the SEC may also order a hearing, and is empowered to determine whether the application should be granted "and what terms should be imposed by the Commission for the protection of investors."

- 6. Since the effect of the tender offer was only to give to those Concord stockholders who wished to take advantage of it the opportunity to get their money earlier, and since it seemed highly likely that plaintiff would (as he has done) seek a preliminary injunction against the merger if his motion to enjoin the tender offer were not granted, I advised Concord and AFW that the expenditure of additional time and money in opposing the motion -- particularly the time of counsel who expected to be, and in fact were, busy on the return day of the motion revising the proxy statement to meet the SEC's comments -- seemed unwarranted, and that it would be preferable to withdraw the offer and proceed as quickly as possible with the proposed merger. They concurred, and the tender offer was withdrawn on the morning of March 3, 1975.
- 7. Even though the tender offer was withdrawn 48 hours before its expiration, and even though there was no advertising of the offer and no solicitation of tenders, 589 stockholders tendered a total of 212,469 shares, representing 38% of the Concord stock held by others than the Weinstein family The certificate of Chemical Bank, the Tender Agent, showing the number of shares tendered, is annexed hereto as Exhibit 3.
- 8. The press release announcing withdrawal of the tender offer (which is Exhibit B to the moving affidavit of plaintiff's counsel) also stated that it was "anticipated that a definitive proxy statement will be mailed to stock-holder by the end of next week", i.e., the week ending March 14th. On March 11, 1975, plaintiff filed an amended

complaint and served notice of this motion to enjoin consummation of the merger.

9. Comments on Concord's proxy material were received by us from the SEC on March 11, 1975, and revised material was filed with the SEC on March 13th. On Friday, March 14th, the SEC advised that it had no further comments, and we proceeded to order the final printing and mailing of the definitive Proxy Statement, which was completed on Monday, March 17th. A copy of the Proxy Statement is annexed hereto as Exhibit 4. In order to allow more time for stockholders to receive and consider the Proxy Statement and determine whether to follow the procedure for dissenting and obtaining an appraisal, the date of the special meeting of Concord stockholders to vote on the merger was changed from April 3rd to April 10, 1975.

## The Nature Of This Action And The Motion

wholly unsupported\* allegations of fraud and illegality

-- which are answered in ¶¶ 12-14, below -- the amended

complaint amounts basically to a claim that defendants

plan "to freeze out the public shareholders of Concord . . .

at unreasonably low prices" (¶ 16 of the amended complaint;

also, ¶ 25), or at a "grossly unfair" price (¶ 42), and that

this violates federal and state laws. In fact, of course,

<sup>\*</sup>The motion is made solely on the affidavit of plaintiff's counsel (the "Coleman affidavit") which contains no charges of misrepresentation or omission, and no facts not previously disclosed by Concord, and a "verified" amended complaint in which every allegation except plaintiff's stock ownership is made upon information and belief.

the minority shareholders are assured by the appraisal statute of the right to receive the "fair value" of their shares, so that the claim that the amount these share-holders will receive is "unreasonably low" or "grossly unfair" poses no issue for this Court.

- cord's proxy material before amending his complaint and making this motion, and therefore has not made any claim of material misstatement or omission in the Proxy Statement; in any event, there is no material misrepresentation or omission in the Proxy Statement. Plaintiff's only efforts at charging specific acts of fraud or misrepresentation are described below in paragraphs 12-14, together with defendants' answers thereto.
- complaint and ¶¶ 11-13 of the Coleman affidavit) that AFW's tender offer was fraudulent in not disclosing that it was designed to enable Concord to evade the proxy rules and the scrutiny of the SEC thereunder. As shown above (¶¶ 5 and 9), this charge is baseless in law and in fact. In any event, however, it has been rendered entirely moot by (a) the withdrawal of the tender offer and (b) Concord's compliance with the proxy rules and use of a proxy statement which embodies the SEC's comments (the SEC, of course, does not pass on the fairness of the merger, but comments on the requisite disclosures).
  - 13. Plaintiff alleges that Concord's "prosperity"\*

<sup>\*</sup>Concord's "prosperity" is alleged in ¶ 12 of the amended complaint to be evidenced by an increase in book value from \$6.75 to over \$7.75 (actually \$7.82 per share) in over 6-1/2 years. This represents a growth rate of under 2-1/2% a year. Plaintiff fails to point out, moreoven, that the book value was \$8.01 per share on January 3, 1971, and has not quite been reached again in the ensuing 4 years.

has been even greater than the published figures reflect, because the individual defendants caused Concord to report "improperly depressed or deferred" earnings by the use of "substantial and improper inventory mark-downs and by unwarranted reserves and by the utilization of other improper accounting practices" (99 13 and 24 of the amended complaint). These unsupported allegations are made on information and belief, and are not contained or even referred to in the Coleman affidavit. As shown by the accompanying affidavits of Martin Wolfson and David R. Caplan, these charges are wholly unfounded. The only reserves maintained by Concord have been reserves for depreciation, which are computed in accordance with ottled guidelines; a reserve for doubtful accounts which is prepared after careful review of the receivables and which in any event has been lower in recent years than it was five years ago; and a provision for losses in connection with the closing of the warehouse which is still being augmented because a new tenant has not yet been found for the warehouse (Wolfson affidavit, p. 4).

Nor have there been any "unwarranted mark-downs".

Inventories are valued at the lower of cost and market, and whenever a market value lower than cost is used it reflects the best judgment at the time of Concord's top operating and financial officers, after review of the relevant factors. Inventory mark-downs are regular occurrences in the fashion industry, due primarily to fluctuating prices of greige goods and the obsolescence of styled finished goods which are not sold during the selling season (Wolfson affidavit, ¶ 3; Caplan affidavit, ¶ 2). Furthermore, the charge that

excessive inventory mark-downs were used to depress earnings makes no sense; while the effect of an excessive mark-down at the end of any one fiscal period would be to understate the reported profits of that period, the sale of the marked-down merchandise in the following fiscal period would result in an offsetting over-statement of the profits of that period.

14. Plaintiff also alleges (¶ 24 of the amended complaint) that the market price of the Concord stock was "artificially depressed" because defendants caused Concord "to refrain from declaring any cash dividends" although it had "large sums of cash and other liquid assets which are unnecessary for its operation". The Coleman affidavit (9 5) refers parenthetically to the fact that the complaint makes this allegation, but Mr. Coleman does not himself make such a charge. The charge itself is patently baseless. Dividends were suspended after the first quarter of 1970, a year in which Concord was committing substantial investments in its knitting plant and new distribution center (see 11 18 and 20, below), had large short-term bank loans ranging up to \$9,600,000, was arranging a term loan of \$8,400,000 from The Prudential Insurance Company, and was facing sharply declining sales and earnings (it earned only \$203,000 for the entire year 1970 on sales of \$52,052,000, down from earnings of \$2,066,917 on sales of over \$63,000,000 in 1969). Furthermore, as Concord's Statement of Operations shows (Proxy Statement, page 10), for the eight-month fiscal year ended August 29, 1971 and the full fiscal year ended September 3, 1972, Concord suffered an aggregate net loss

of \$1,451,349, which it has not yet recouped in subsequent earnings (the net income for fiscal 1973, fiscal 1974 and the first 22 weeks of fiscal 1975, together aggregate \$1,109,468).

present, and no question of any financial wrongdoing or any misrepresentation or failure to disclose. That the real, and only, issue here is whether the merger itself, in eliminating the public shareholders, is a violation of law, is recognized by the Coleman affidavit, which states:

"14. It is submitted that the merger resolutions adopted by Concord's Board of Directors are fraudulent and that any merger between Concord and AFW upon the terms approved by Concord's directors would be an illegal merger in violation of the provisions of the Exchange Act as well as state law. . . . a proposed merger which has no reason other than freezing out and eliminating the public shareholders of Concord would be a perversion of state statutes permitting mergers. Such a merger would be a sham and a fraud." (Emphasis supplied)

Defendants' brief will how that a merger for the purpose of "going private" where, as here, the right of the minority stockholders to receive "fair value" is assured by appraisal rights, is valid under New York law, and that since the transaction is accomplished with a full, fair and accurate disclosure, there is no violation of Rule 10b-5.

#### Background And Recent Financial History Of Concord

July 11, 1968, Concord was a family business owned by Alvin and Frank Weinstein and the Weinstein family; its business had been founded in 1920 by their father. The business had

grown during the years preceding 1968, culminating in record net earnings of \$2,215,429 in 1968 on net sales of \$53,293,243, and net earnings of \$2,066,917 in 1969 on sales of \$63,574,939. Concord's performance since then has been quite different, as appears from the figures contained in § 14 above, and from the detailed Statement of Operations for the past five years (and recent interim periods) contained in the Proxy Statement (Exhibit 4 hereto) at page 10.

in part the highly volatile nature of the fashion industry, in part the increased overhead resulting from the rapid growth in 1968 and 1969, and in part the unforeseen adverse effects of two major moves: the substantial expansion of its knitting operations, including the construction of a plant in Milledgeville, Georgia, and the construction of its large distribution center in North Bergen, New Jersey. These are described in §§ 18-20, below.

fabrics. As stated in its prospectus dated July 11, 1968, it had "recently introduced a line of knitted fabrics".

The prospectus also indicated that Concord intended to expand knitting operations and that a portion of the proceeds of the public offering of common stock might be used to acquire plant facilities and equipment for the manufacture of knit fabrics. Concord did expand its knit operations very substantially; as shown in its annual reports on Form 10-K, knit volume represented 10% of sales in 1969, 22% in 1970, 37% in the short fiscal year ended August 29, 1971, and a high of 40% in fiscal 1972, declining to 25% of sales in fiscal 1973 and 28% in fiscal 1974. During 1970, Concord

purchased land at Milledgeville, Georgia, and commenced construction of a 110,000 square-foot knitting plant designed to provide a portion of its requirements for knitted fabrics. The plant, which together with its equipment now represents a total cost of approximately \$3,800,000, was opened in July, 1971. Substantial problems were encountered in getting the knitting plant into efficient production.

Concord had to take substantial write-downs of excessive knit inventories, and suffered start-up costs relating to the Milledgeville plant. Severe problems in the Knit Division, including substantial further write-downs of excessive inventories and operating losses at the Milledgeville plant, contributed the major portion of Concord's net loss in that year of \$1,273,000. The Knit Division was reorganized under its new president, Earl Kramer, just prior to the end of fiscal 1972, and its operations began to improve thereafter.

the construction on its behalf, and the leasing to it, of a 160,000 square-foot distribution center in North Bergen, New Jersey, designed to provide it with the capacity to handle what was expected to be a substantial increase in the amount of merchandise sold to retail stores for resale to the home-sewing market. The lease runs until 1995, and provides for rental and other expenses currently aggregating \$360,000 per year. Substantially increased competition in the sale of fabrics for the retail trade kept Concord's retail sales volume from increasing as expected, and as a

result the new distribution center operates estimually at well below its capacity, causing substantial losses and leading to the decision to close the distribution center in September, 1973. This resulted in a \$1,200,000 provision for loss in fiscal 1973, an additional \$740,000 provision in fiscal 1974, and a further provision of \$30,000 per month starting in the second quarter of the current fiscal year, which will continue until it appears that the facility can be rented to another tenant.

- 21. As can be expected, the price of Concord's common stock has reflected the unfavorable results it has generally experienced over the past five years, as well as the general stock market decline over the past year or two. The price range of the common stock since July 11, 1968, the day of the initial public offering, is set forth on page 14 of the Proxy Statement, and shows that since the beginning of 1973 the common stock has never sold at higher than \$5-1/4, and since October 1, 1973 has never sold higher than \$3-1/4, and for most of that period has sold below \$2. Indeed, until a few days before the announcement of the tender offer at \$3 per share, the stock was selling at no more than \$1-3/4.
- and proposed merger the price of the Concord common stock jumped initially to \$2-7/8 and currently ranges between \$2-1/2 \$2-5/8. It seems fair to assume that were the proposed merger to be enjoined, the price would decline substantially and the 589 holders of an aggregate of over 212,000 shares who had sought to receive \$3 a share, net, by accepting the tender offer but were prevented

from doing so by plaintiff's motion to enjoin the offer, might find it difficult to realize as much as \$2 a share, net, after commissions.

Sidney of Alberman

Sworn to before me this 21st day of March, 1975.

Sitte Menkemen

BERTHA OTTENHEIMER
NOTARY FUDITION State of New York
No. 03-02-4-02-0
Qualified in Urana County
Certificate filed in New York County
Term Expires March 30, 1976

# AFW Fabric Makes Tender Bid for Concord To Have It Go Private

By a WALL STREET JOURNAL Staff Reporter
NEW YORK-AFW Fabric Corp., said it
made a tender offer for Concord Fabrics
Inc.'s common stock at \$3 a share. The
move, it said, is aimed at returning Concord
to the status of a privately held corporation
owned by the Weinstein family. Concord
went public in 1968.

AFW, which owns 68% of Concord's outstanding shares, is owned by Alvin Weinstein, Concord's chairman, and Frank Weinstein, Concord's executive committee chairman.

man.
The offer's total value, based on the 559,182 shares owned by holders other than the two Weinsteins, is \$1.7 million. Concord stock closed Tuesday, the last day it was traded before the announcement, at \$2.125 a share on the American Stock Exchange. Yesterday, it closed at \$2.75, up 62½ cents.

Concord said that its board has approved a merger of AFW and Concord and that a meeting of Concord shareholders to approve the merger will be held as soon as possible after the tender offer expires March 5.

Under the proposed merger's terms, Concord holders other than AFW will receive

Under the proposed merger's terms, Concord holders other than AFW will receive 31 in eash a share, and shareholders of AFW will receive shares in the surviving corporation. AFW said the merger should take place about April 1. The company said that its tender agent is Chemical Bank and that it won't pay fees to brokers for soliciting tenders.

#### EXHIBTI 2 TO AFFIDAVIT OF SIDNEY J. SILBERMAN - SCHEDULE 13D

SECURITIES AND ENCHANGE COMMISSION Washington, D.C. 20549

SCHEDULE 13D

Filed Pursuant to

Rule 13d-1 and Rule 14d-1

Under the Securities Exchange Act of 1934

AFW Fabric Corp.

4 Forte Drive

Old Westbury, New York 11568

Attention: Alvin Weinstein

(Acquirer of Securities to which this Schedule relates)

Please send copies of all communications to: ..

Sidney J. Silberman, Esq.

c/o Kaye, Scholer, Fierman, Hays

... & Handler

425 Park Avenue

New York, New York 10022

#### Item 1. Security and Issuer

The securities to which this Schedule 13D relates are shares of Common Stock of Concord Fabrics Inc. (the "Company"), a New York corporation with its principal place of business located at 1411 Broadway, New York, N.Y. 10018.

#### Item 2. Identity and Background

This Schedule is being filed by AFW Fabric Corp. (the "Purchaser"), a New York corporation, with an address at 4 Forte Drive, Old Westbury, New York 11568.

The following information is given for the officers and directors of the Purchaser.

Alvin Weinstein, President, Treasurer and Director of the Purchaser, resides at 4 Forte Drive, Old Westbury, New York 11568. His present principal position, which he has occupied since 1968, is Chairman of the Board and Chief Executive Officer of the Company. Prior to being elected Chairman of the Board in 1968, Mr. Weinstein served for many years as an executive and Secretary of the Company.

Director of the Purchaser resides at 40 West 10th Street,
New York, New York 10011. His present principal position,
which he has occupied since 1971, is Chairman of the
Executive Committee of the Company. Prior to being elected
Chairman of the Executive Committee, Mr. Weinstein served
for many years as President of the Company.

Joan Weinstein, Assistant Secretary and Director of the Purchaser, resides at 4 Forte Drive, Old Westbury, New York 11562. Mrs. Weinstein has been employed doing promotional and marketing work for the Company for the last 1-1/2 years. Prior to that, Mrs. Weinstein was a housewife and not otherwise employed.

The principal business address of Alvin, Frank and Joan Weinstein is the Company's principal office at 1411 Broadway, New York, N.Y. 10018.

### Item 3. Source and Amount of Funds or other Consideration

The information set forth under 'Source and Amount of Funds" in the Offer to Purchase filed herewith as Exhibit 1 is incorporated herein by reference.

#### Item 4. Purpose of Transactions

The information set forth under "Purpose of this Offer" in the Offer to Purchase filed herewith as Exhibit 1 is incorporated herein by reference.

### Item 5. Interest in Securities of the Issuer

Concerning the Purchaser; Purchaser's Interest in the Company" in the Offer to Purchase filed herewith as Exhibit 1 is incorporated herein by reference. No other transactions involving shares of the Company were effected during the past 60 days by the Purchaser or any of its officers and directors.

# Respect to Securities of the Issuer

Except as disclosed herein and in the Offer to
Purchase filed herewith as Exhibit 1, there are no contracts,
arrangements or understandings with respect to the securities
of the Company.

# Ro persons have been employed, retained or are to be compensated to make solicitations or recommendations to

security holde regarding the tender offer. Brokers, the ers, banks and trust companies will be compensated for their out-of-pocket expenses in forwarding the Offer to Purchase to the beneficial owner of the shares of the Company's Common Stock or in forwarding the Letter of Transmittal together with the certificates for the shares to the Exchange Agent for the tender offer.

Item 8. Material to be Filed as Exhibits

Exhibit I. Offer to Purchase, dated February 6,

1970

Exhibit II. Letter of Trans (1911.

#### SIGNATURE

I certify that t the best of my knowledge and belief the information set forth in this statement is true, complete and correct.

AFW FABRIC CORP.

Alvin Weinstein
President

Dated: February 6, 1975

EXHIBIT 3 TO AFFIDAVIT OF SIDNEY J. SILBERMAN - CERTIFICATE OF TENDER AGENT

#### CERTIFICATE OF TENDER AGENT

Chemical Bank, a New York Banking corporation, as duly appointed Tender Agent, to accept shares of Concord Fabrics Inc. presented under the purchase offer made by AFW Fabric Corporation on February 6, 1975 and which offer was withdrawn by notification to us dated March 4, 1975, we did return to 589 presentors and notified 10 presentors requesting Protection against future delivery, a total of 212,469 shares along with the text of a letter furnished by AFW Fabric Corporation.

IN WITNESS WHEREOF, Chemical Bank has caused this certificate to be executed by an Assistant Tresourer, hereunto duly authorized, this 20th day of March, 1975.

CHEMICAL BANK

Assistant Treasurer

#### CONCORD FABRICS INC.

# NOTICE OF SPECIAL MEETING OF SHAREHOLDERS April 10, 1975

March 17, 1975

#### To Our Shareholders:

You are cordially invited to attend a special meeting of shareholders of Concord Fabrics Inc. (the "Company") to be held on April 10, 1975 at 9:30 a.m. at Irving Trust Company, 245 Park Avenue, New York, New York, for the purpose of considering and acting upon:

- (1) A proposal to approve and adopt a P'n of Merger between the Company and AFW Fabric Corp. pursuant to which the Company will become a privately-held company and each outstanding share of Common Stock of the Company (other than shares owned by AFW Fabric Corp.) will be exchanged for \$3 in cash, as described in the accompanying Proxy Statement; and
- (2) Such other business as may properly come before the meeting or any adjournment thereof.

Only shareholders of record at the close of business on March 7, 1975 will be entitled to receive notice of, and to vote at, the meeting or at any adjournment thereof.

Under the Business Corporation Law of the State of New York, any share-holder of the Company who objects to the merger in the manner required by statute is entitled to payment of the "fair value" of his shares as determined in a judicial appraisal proceeding. See "Rights of Dissenting Shareholders" [p. 6] in the accompanying Proxy Statement.

Please sign, date and mail the enclosed proxy promptly in the enclosed envelope (which requires no postage if mailed in the United States) so that your shares of stock may be represented at the meeting.

By Order of the Board of Directors,

MARTIN WOLFSON
Secretary

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#### CONCORD FABRICS INC.

## PROXY STATEMENT

A special meeting of shareholders of Concord Fabrics Inc. (the "Company") is to be held on April 10, 1975 for the purpose of voting on a proposal to approve and adopt a Plan of Merger of AFW Fabric Corp. ("AFW") into the Company; a copy of the Plan of Merger is attached as Exhibit A to this Proxy Statement. The merger will result in the Company becoming a privately-held concern owned entirely by Alvin Weinstein, Frank Weinstein and certain Weinstein family trusts. This will be accomplished by (a) each shareholder of the Company (other than AFW) receiving \$3 a share in cash, and (b) the shareholders of AFW (i.e., the Weinstein family and the trusts) receiving 1,226,549 shares of the Company's Common Stock, which will represent all of the Company's then outstanding stock.

The accompanying form of proxy for use at the meeting and at any and all adjournments thereof is solicited by management and may be revoked, at any time prior to its exercise, by written notification to the Secretary of the Company. Proxies in the accompanying form which are properly executed by shareholders and duly returned to management and not revoked will be voted in accordance with the specification thereon, and in the absence of such specification, in favor of the proposed merger described below. Management knows of no business to be presented for consideration at the meeting other than as stated in the notice of meeting. It is intended, however, that the persons named in the management proxies may vote in accordance with their judgment on any other proposal properly presented for action.

The Company will pay the cost of soliciting proxies in the accompanying form. The address of the principal executive office of the Company is 1411 Broadway, New York, New York 10018 and its telephone number is 212-594-2300. It is contemplated that this Proxy Statement, together with the accompanying form of proxy, will be mailed to shareholders on or about March 17, 1975.

#### INTRODUCTORY STATEMENT AND SPECIAL FACTORS

In considering the proposed merger, shareholders should consider the following:

#### 1. Purpose of Merger.

The purpose of the proposed merger of AFW into the Company is to return the Company to the status of a privately-held corporation owned by the Weinstein family. Upon consummation of the merger, the Weinsteins will be the sole stockholders and directors of the Company, and will thus be able to determine all policies of the Company, such as salaries for themselves and others, dividends and business activities, without public scrutiny and solely with regard to their own interests.

#### 2. Ownership of Company's Stock by AFW.

AFW was organized in January 1975 for the purpose of making a tender offer for the Company's shares and thereafter causing a merger of AFW and the Company. On February 5, 1975 AFW acquired from Alvin Weinstein, Frank Weinstein, and seven trusts of which Frank Weinstein is trustee or a co-trustee, an aggregate of 1,226,549 shares, representing approximately 68% of the Company's outstanding Common Stock. This stock was acquired solely in exchange for shares of AFW's stock, all of which is owned by the Messrs. Weinstein and the trusts. Alvin Weinstein is Chairman of the Board and chief executive officer of the Company, and Frank Weinstein is Chairman of the Executive Committee of the Company. See "Purpose and Background of Proposed Merger." [p. 3]

3. Tender Offer by AFW.

On February 6, 1975 AFW made a tender offer to purchase the Company's outstanding shares of Common Stock at a price of \$3 per share. Because of litigation seeking to enjoin the tender offer (see "Litigation" [p. 7]), AFW withdrew the tender offer on March 3, 1975 and returned to stockholders all shares tendered by them. Prior to the withdrawal of the tender offer, an aggregate of 212,469 shares had been tendered.

Inability to Defeat Approval of Merger.

AFW owns more than the percentage of the Company's Common Stock required to approve the merger and intends to vote such stock in favor of the merger. Accordingly, the other shareholders of the Company will be unable to defeat approval of the merger by voting against it and thus may either accept \$3 per share in cash or exercise their appraisal rights. See "Voting Rights and Vote Required" [p. 3], "Terms of the Proposed Merger" [p. 5] and "Rights of Dissenting Shareholders" [p. 6].

5. Litigation.

As of the date hereof three separate actions had been commenced in Federal court seeking to enjoin the merger, and one in the New York State court seeking to enjoin the tender offer. See "Litigation" [p. 7].

AFW's Controlling Interest in Company.

As a result of its ownership of 68% of the Common Stock of the Company, AFW had and has the power to control the policies and management of the Company. In addition, Alvin and Frank Weinstein are the only executive officers of AFW, together own 99% of AFW's stock, and are two of the three principal executive officers of the Company. Accordingly, the negotiations concerning the terms and other aspects of the proposed merger cannot be considered to have been conducted at arm's length. The Messrs. Weinstein are directors of the Company, and four of the other six directors are executives of the Company; another director is the father of a member of the corporate finance department of Shearson Hayden Stone Inc., the investment banking firm which rendered an opinion concerning the value of the Company's shares (see "Action of Board of Directors" [p. 5]), and the remaining director (a management nominee) was elected to the Board in January, 1975.

7. Prior Public Offerings.

An initial public offering of Common Stock was made entirely by the Company in July, 1968 at a price of \$15 per share (before adjustment for a subsequent stock dividend). In June, 1969 Alvin and Frank Weinstein sold publicly 100,000 shares each, at a price of \$20 per share, realizing net proceeds of about \$1,850,000 each.

8. Source of Funds.

The funds for the payment to stockholders pursuant to the terms of the merger will come from loans made to the Company by certain banks. See "Source of Funds" [p. 5].

9. Summary of Notice Required to Exercise Appraisal Rights.

A shareholder who desires to exercise his appraisal rights and to receive payment for the fair value of his shares as determined in a judicial appraisal proceeding is required to file with the Company before the vote of shareholders, as the first step in the procedure specified by New York law, a written objection to the merger, including a statement that he intends to demand payment for his shares if the merger is effected. A vote for adoption of the merger will constitute a waiver of a shareholder's appraisal rights, and a mere vote against the proposal without filing the requisite written objection is not considered sufficient. See "Rights of Dissenting Shareholders" [p. 6].

#### 10. Per Share Data.

The following table gives the Company's net earnings on a per share basis for the periods indicated and its net book value per share at the end of such periods. See "Per Share Data" [p. 8].

	Jan. 3, 1971	Weeks Ended Aug. 29, 1971*	Sept. 3, 1972	Sept. 2, 1973	Sept. 1, 1974
Fiscal Years Ended:	(53 Weeks)		(53 Weeks)	(52 Weeks)	(52 Weeks)
Earnings or (loss) from continuing operations	\$ .11	(\$ .15)	(\$ .76)	\$ .13	\$ .29
Net earnings or (loss)	\$ .11 \$8.01	(\$ .10) \$7.91	(\$ .71) \$7.20	\$ .13 \$7.32	\$ .29 \$7.61

<sup>\*</sup> See Note 1 to "Per Share Data" [p. 8].

	13 Weel	13 Weeks Ended		s Ended	22 Weeks Ended	
Interira Periods:	Dec. 2, 1973	Dec. 1, 1974	Feb. 3, 1974	Feb. 2, 1975	Feb. 3, 1974	Feb. 2, 1975
Net earnings	\$ .23	\$ .01	\$ .05	\$ .20	\$ .28	\$ .21
Net book value at end of period	\$7.55	\$7.62	\$7.60	\$7.82	\$7.60	\$7.82

## VOTING RIGHTS AND VOTE REQUIRED

Only shareholders of record at the close of business on March 7, 1975 will be entitled to vote at the meeting. At that date, the Company had outstanding and entitled to vote at the meeting 1,785,731 shares of Common Stock, each share of Common Stock being entitled to one vote. On the record date, AFW (and the Messrs. Weinstein by virtue of their ownership of AFW) owned beneficially 1,226,549 shares (constituting approximately 68%) of the Company's outstanding Common Stock (see "Information Concerning AFW" [p. 17]). Other than AFW, no person owned of record, and insofar as is known to the Company, other than the Messrs. Weinstein, no person owned beneficially, more than 10% of the outstanding shares of the Company.

Under the Business Corporation Law of the State of New York the affirmative vote of at least two-thirds of the outstanding shares of Common Stock of the Company is required for approval of the merger. AFW owns more than the number of shares of the Company's Common Stock required for approval of the merger and intends to vote its shares in favor of the merger. Accordingly, other shareholders of the Company will be unable to defeat approval of the merger by voting against it.

#### PURPOSE AND BACKGROUND OF PROPOSED MERGER

The purpose of the proposed merger of AFW and the Company is to return the Company to the status of a privately-held corporation owned by the Weinstein family.

AFW, a New York corporation, was organized in January, 1975 for the purpose of making the tender offer and thereafter causing a merger of AFW and the Company. In February, 1975 AFW acquired all of the shares of the Company's Common Stock owned by the Messrs. Weinstein and seven trusts of which Frank Weinstein is trustee or co-trustee (in one trust he is also the income beneficiary and in the other trusts the children of Alvin Weinstein have remainder interests) solely in exchange for shares of AFW's Common Stock. As a result of this exchange, AFW owned 1,226,549 shares of the Company's Common Stock, representing approximately 68% of the outstanding shares.

On February 6, 1975 AFW made a tender offer to purchase the Company's outstanding shares of Common Stock at a price of \$3 per share. Because of litigation seeking to enjoin the tender offer (see "Litigation" [p. 7]), AFW withdrew the tender offer on March 3, 1975 and returned to stockholders all shares tendered by them. Prior to the withdrawl of the tender offer, an aggregate of 212,469 shares had been tendered.

In recent years the Company's stock has not been actively traded. For example there were no sales of stock on the American Stock Exchange on 113 of the 277 trading days from January 2, 1974 through February 4, 1975, (the last trading day prior to the announcement of the tender offer and proposed merger), and the average trading volume on the days when the shares did trade was 503 shares.

The Company thus does not afford its shareholders the advantage of an active trading market for their shares. As a result of the merger it will be offering all its public shareholders a cash price for all of their shares which the Company believes to be not less than their fair value and which is substantially higher than the market price prevailing before announcement of the tender offer on February 6, 1975. At the same time the Weinstein family will have the Company returned to their sole ownership, with the ability to operate it without public scrutiny and solely for their own benefit, and will have their interest in the Company's equity and in its earnings increased as described below under the caption "Effect of Merger on Weinstein Family".

Since upon consummation of the merger the Company will become a privately-held corporation owned by the Weinstein family, its shares will be delisted by the American Stock Exchange and will be deregistered under the Securities Exchange Act of 1934, and the Company will no longer be required

to file reports with the Securities and Exchange Commission.

If the merger should not be consummated the Company will not seek the delisting of its shares by the American Stock Exchange.

# EFFECT OF MERGER ON WEINSTEIN FAMILY

The result of the proposed merger will be to return the Company to the status of a privately-held corporation owned entirely by the Weinstein family, who will thus be able to determine all policies of the Company, such as salaries for themselves and others, dividends and business activities, without public scrutiny and solely with regard to their own interests.

The effect of the proposed merger will also be that without any additional investment on the part of the Weinstein family their interest in the stockholders' equity of the Company will be increased from approximately \$9,494,000 (representing 68% of the equity as at February 2, 1975) to approximately \$12,285,000 (representing 100% of such equity on a pro forma basis, giving effect to consummation of the merger—see "Capitalization" [p. 9]), and their interest in the Company's net earnings for the fiscal year ended September 1, 1974 will increase from approximately \$354,000 (68% of such earnings) to approximately \$442,000, being 100% of such earnings on a pro forma basis, as shown in the table below.

approximately 4.12,000, cong			Unaudited	
	Year Ended September 1, 1974	13 Weeks Ended December 1, 1974	9 Weeks Ended February 2, 1975	22 Weeks Ended February 2, 1975
Net earnings (historical)	\$520,340	\$15,482	\$348,821	\$364,303
Pro forma adjustments:  Estimated interest (at 934% effective annual				
cancellation of 559,182 shares of Common Stock	(103,000)	(40,900)	(28,300)	(69,200)
Income tax benefit attributable to estimated interest	85,100 (78,500) \$441,840	21,300 (19,600) (\$4,118)	14,700 (13,600) \$335,221	36,000 (33,200) \$331,103
Equity of Weinstein group in earnings or (loss)				
Historical earnings—based on 68% owner- ship of outstanding shares	\$353,831	\$10,528	\$237,198	\$247,726
Pro forma earnings or (loss) — based on 100% ownership of outstanding shares	\$441,840	(\$4,118)	\$335,221	\$331,103

The foregoing pro forma figures are stated before any reduction in general administrative expenses that may be realized as a result of the proposed merger.

#### ACTION OF BOARD OF DIRECTORS

On February 5, 1975, the Board of Directors of the Company voted to approve the merger with AFW. The Board of Directors believes that the price of \$3 per share to be paid to public shareholders upon the merger is fair. In reaching that conclusion the Board considered the price of, and activity in, the Company's stock, the financial position, earnings and prospects of the Company, the volatile nature of the fabric industry, and other factors, and the opinion of Shearson Hayden Stone Inc., an investment banking and securities brokerage firm ("Shearson").

Shearson has rendered to the Board of Directors a written opinion that a price of \$3 per share is fair and equitable; a copy of the opinion is attached hereto as Exhibit B. In reaching that opinion Shearson analyzed the financial statements and stock market data (including historical price ranges, trading volumes and price earnings ratios) for the Company and certain other publicly held companies in the textile industry, the terms and circumstances of a number of recent cash tender offers undertaken by publicly owned companies and other factors it considered to be relevant. A predecessor of Shearson was the underwriter for the two public offerings of the Company's shares, and an officer of Shearson's corporate finance department who prepared the opinion is the son of a director of the Company. The Company has agreed to pay Shearson a fee of \$10,000 for the preparation and rendition of its opinion.

The action of the Board of Directors must be considered in the light of the following facts, previously set forth: the Company is controlled by the Messrs. Weinstein, they are directors of the Company, and four of the other six directors are executives of the Company.

#### SOURCE OF FUNDS

The funds to pay for the Company's shares which, upon the contemplated merger between AFW and the Company, will be converted into cash will be provided by additional short term borrowings under the Company's lines of credit from Chemical Bank, Manufacturers Hanover Trust Company and Irving Trust Company, bearing interest at rates of ½ to ½ of 1% over the prime rate.

In order to effect the contemplated transactions, the consent of The Prudential Insurance Company of América under a Note Agreement is required; such consent has been obtained.

#### TERMS OF PROPOSED MERGER

The terms of the merger are set forth in the Plan of Merger between the Company and AFW which has been approved by the Board of Directors of the Company and by the Board of Directors and shareholders of AFW. A copy of the Plan of Merger is attached hereto as Exhibit A.

Pursuant to the terms of the Plan of Merger, (a) the holders of record of the outstanding Common Stock of the Company (other than AFW) will receive \$3 in cash for each share of Common Stock of the Company held by them, (b) the shares of Common Stock of the Company held by AFW will be cancelled, and (c) the shareholders of AFW will receive one share of the Company's Common Stock for each AFW share held.

The merger will become effective as soon as practicable after the shareholders' meeting on April 3, 1975. After the merger becomes effective, each shareholder of the Company (other than AFW) will receive by mail a letter of transmittal and will be able to obtain the amount payable with respect to his shares by transmitting his stock certificates, together with the signed letter of transmittal, to Chemical Bank, the Exchange Agent. There will be no expense or commission charged to the shareholders in connection with the surrender of their stock certificates and payment for their shares.

Upon consummation of the merger, the present holders of the outstanding shares of the Company's Common Stock will cease to be shareholders of the Company and will have no voting or other rights with respect to such shares, except the right to receive the amounts payable with respect to such shares in accordance with the terms of the Plan of Merger, without interest thereon, upon surrender

of their certificates, or, in the case of dissenting shareholders, in accordance with the provisions described in "Rights of Dissenting Shareholders" [p. 6].

The Plan of Merger provides that it may be terminated and the merger may be abandoned by AFW, if prior to the consummation thereof, (i) there shall have been instituted or threatened any action or proceeding before any court or administrative agency by any government agency or any other person (a) which challenges or otherwise relates to the proposed merger of the Company and AFW, or (b) which, in the judgment of AFW, might materially adversely affect the Company, or AFW or its officers, directors or shareholders; or (ii) there shall have been declared any state of war or banking moratorium or suspension of business by banks in the United States or a general suspension of or limitation on prices for trading on the New York or American Stock Exchange, or (iii) there shall have been, in the judgment of AFW, a material adverse change in the business, financial condition or operations of the Company.

An aggregate of \$1,677,546 will be required for payment at \$3 per share to shareholders (other than AFW) on the merger. The necessary funds will be provided by additional short term borrowings under the Company's lines of credit from Chemical Bank, Manufacturers Hanover Trust Company and Irving Trust Company, bearing interest at rates of ½ to ½ of 1% over the prime rate.

## RIGHTS OF DISSENTING SHAREHOLDERS

Section 910 of the Business Corporation Law of the State of New York grants to dissenting shareholders of a York corporation involved in a merger the right to receive payment in cash of the fair value of the shares as determined by an appraisal proceeding if the dissenting shareholder complies with the procedure required by Section 623. Set forth below is a summary of Section 623, but reference is made to Sections 910 and 623, a copy of each of which is attached as Exhibit C, for a complete statement of the rights and obligations of dissenting shareholders.

A shareholder who desires to object to the merger and to receive payment for the fair value of his shares must first file with the Company, before the meeting of shareholders to authorize the merger, or at such meeting but before the vote, written objection to the merger including a statement that he intends to demand payment for his shares if the merger is effected; a vote against the merger will not by itself be considered by the Company to be the written objection required to be filed by an objecting shareholder. In order to object, the shareholder need not also vote against the merger, but by voting in favor of the merger the shareholder waives his rights under Section 910.

Within 10 days after the date of the shareholders' vote authorizing the merger, the Company must, and intends to, give written notice by registered mail of such authorization to each shareholder who filed written objection to the merger and did not vote in favor thereof. Within 20 days after the giving of such notice, any such shareholder who elects to dissent must file with the Company a written notice of such election, stating his name and residence address, the number of shares of stock as to which he dissents and a demand for payment of the fair value of his shares. Such shareholder may not dissent as to less than all his shares. At the time of filing the notice of election to dissent or within one month thereafter, the shareholder must submit the certificates representing his shares to the Company or Chemical Bank, the Transfer Agent, for notation thereon of the election to dissent, after which such certificates will be returned to the shareholder. Failure to submit the certificates may result in the loss of dissenter's rights. Within seven days after the expiration of the period within which shareholders may file their notices of election to dissent, or within seven days after consummation of the merger, whichever is later (but not later than 90 days after the shareholders' vote authorizing the merger), the Company must make a written offer by registered mail (which, if the merger has not been consummated, may be conditioned upon such consummation) to each shareholder who has filed such notice of election to pay for his shares at a specified price which the Company considers to be their fair value. If the Company and the dissenting shareholder are unable to agree as to such value, a judicial determination of fair value will be made in accordance with the procedure specified in Section 623.

#### LITIGATION

Three separate actions have been commenced in the United States District Court for the Southern District of New York seeking to enjoin the proposed merger. They are entitled, respectively, "Arnold Marshel, Plaintiff, v. AFW Fabric Corp., Concord Fabrics, Inc., Alvin Weinstein and Frank Weinstein, Defendants"; "Guy Michaels, Plaintiff, v. Alvin Weinstein, Frank Weinstein, AFW Corporation, Concord Fabrics, Inc. and Shearson Hayden Stone, Inc., Defendants"; and "Jesse Krause, Plaintiff, v. Concord Fabrics, Inc., AFW Fabric Corporation, Alvin Weinstein and Frank Weinstein, Defendants". A fourth suit, entitled "Barry L. Swift, Plaintiff, v. Concord Fabrics, Inc., AFW Fabric Corp., Alvin Weinstein and Frank Weinstein, Defendants", has been commenced in the Supreme Court of the State of New York, New York County, seeking to enjoin the tender offer.

Plaintiff in the Marshel action has made a motion for a preliminary injunction against consummation of the merger. This motion is scheduled to be heard on March 28, 1975.

All three Federal court actions allege basically that the proposed merger violates the anti-fraud provisions, the tender offer rules and the proxy rules under the Federal securities acts; the *Michaels* action, in addition, alleges that the proposed merger violates the provisions of the New York Business Corporation Law, and that if the pro-sions of the New York statute permit the merger they are unconstitutional under the due process clause of the United States Constitution.

The Company believes that all of these actions are without merit and intends to defend them vigorously.

The Company has received an opinion of its counsei, Messrs. Kaye, Scholer, Fierman, Hays & Handler, to the effect that the proposed merger is in conformity with and is valid under the provisions of New York law, and does not violate any of the provisions of Section 10b or Section 14 of the Securities Exchange Act of 1934 or the rules promulgated thereunder, including Rule 10b-5.

#### FEDERAL INCOME TAX CONSEQUENCES

The Company has been advised by its counsel that the Federal income tax consequences of the merger will be as follows:

The exchange of the Company's stock for cash upon the effectiveness of the merger will be treated as a sale of stock. The Company and AFW will not recognize any gain or loss with respect to the exchange. An exchanging shareholder (other than a dealer in the Company's stock) will recognize capital gain or loss measured on a per share basis by the difference between such shareholder's cost or other basis for the Company's stock and \$3. The gain or loss will be long-term if the holding period is in excess of six months.

Under provisions added to the Internal Revenue Code by the Tax Reform Act of 1969 a portion (one-half in the case of individuals) of long-term capital gain will constitute an item of tax preference. A shareholder's items of tax preference may be subject to a minimum tax which, in the case of individuals, is generally equal to 10% of the amount, if any, by which all of the shareholder's items of tax preference for the taxable year exceed the sum of \$30,000 plus the Federal income tax otherwise payable in respect of such taxable year and certain amounts of Federal income tax paid in respect of prior taxable years that ended after December 31, 1969 and not offset against items of tax preference for prior taxable years. Furthermore, to the extent that the amount of a shareholder's items of tax preference for the taxable year (or average items of tax preference for the taxable year and the preceding four taxable years) exceed \$30,000, the amount of the shareholder's income which qualifies for the 50% maximum rate on earned income will be reduced.

In 1974, the House Ways and Means Committee reached certain tentative conclusions concerning an extensive revision of the minimum tax effective for taxable years beginning after 1974. It is not clear to what extent, if any, the current Congress will act to amend the minimum tax provisions and whether such legislation would apply to transactions occurring before its enactment.

Shareholders should consult their own tax advisers as to the Federal, state, local or foreign tax consequences to them of the merger.

#### PER SHARE DATA

#### Historical

The following table presents data relating to the earnings, dividends and book value of the Company on a per share basis. The table is based upon the consolidated financial statements of the Company and Subsidiary included elsewhere herein (reference is made to such statements for more detailed financial information).

ments for more detaned iman	ciai inioin		Fiscal Years	Ended				(Unau	idited)		
		34 Weeks					the 13 s Ended		the 9 Ended	For th Weeks	
	Jan. 3, 1971	Ended Aug. 29, 1971(1)	Sept. 3, 1972	Sept. 2, 1973	Sept. 1, 1974	Dec. 2, 1973	Dec. 1, 1974	Feb. 3, 1974	Feb. 2, 1975	Feb. 3, 1974	Feb. 2, 1975
	(53 Wks.)		(53 Wks.)	(52 Wks.)	(52 Wks.)						
Earnings or (Loss)(2):											
From continuing opera-	\$.11	\$(.15)	\$(.76)	\$.13	\$.29	\$.23	\$.01	\$ .05	\$ .20	\$ .28	\$ .21
From former subsidiary	_	.05	.09	-							
Before extraordinary item	.11	(.10)	(.67)	.13	.29	.23	.01	.05	.20	.28	.21
Extraordinary item	_	`	(.04)		<u>-</u> -		-				
Total	\$.11	\$(.10)	\$(.71)	\$.13	\$.29	\$.23	\$.01	\$ .05	\$ .20	\$ .28	\$ .21
Cash Dividends(3)	\$.10	_	_	_	_	_	_				
Book Value at End of Period		\$7.91	\$7.20	\$7.32	\$7.61	\$7.55	\$7.62	\$7.60	\$7.82	\$7.60	\$7.82
Working Capital at End of Period	:00.00	\$8.66	\$8.80	\$9.45	\$9.53	\$9.66	\$9.61	\$9.69	\$9.83	\$9.69	\$9.83

1. In 1971, the Company changed its fiscal year to one ending on the Sunday closest to August 31. Accordingly, the fiscal period ended August 29, 1971 comprises thirty-four weeks.

2. Average number of common shares outstanding in each period (used in computing the earnings or loss per share data) comprised 1,785,731.

3. Dividends were not paid to the Messrs. Weinstein, who had waived any cash dividends through June 30, 1973 pursuant to an agreement with the underwriters for the Company's first public offering.

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The following table presents the net book value and earnings of the Company on a per share basis after giving pro forma effect to the

merger of AFW into the Company. 9 Weeks Ended 22 Weeks Ended 13 Weeks Ended 52 Weeks Feb. 2, Feb. 3, Feb. 2. Feb. 3. Dec. 2, Dec. 1, Ended 1975 1974 1975 1974 Sept. 1, 1974 1973 1974 \$ .27 \$ .38 \$ .27 \$ .32 \$ .06 \$ .36 Net earnings per share(1) .....

\$9.72

Book value per share at end of period(2) ...... (1) Earnings per share reflect pro forma adjustments for interest (net of income tax benefit) on the \$1,677,546 required to pay for 559,182 shares at \$3 per share (see "Effect of Merger on Weinstein Family" [p. 4]), and the consequent reduction of the number of shares outstanding by 559,182.

\$9.63

\$9.73

\$9.70

\$10.02

\$9.70

\$10.02

(2) Book value per share reflects the pro forma adjustment for the payment of \$3 per share for 559,182 shares as if payment for such shares had been made at each of the above dates. Other costs related to the merger were not included in the calculations.

#### CAPITALIZATION

The following table sets forth the capitalization of Concord Fabrics Inc. and Subsidiary (the "Company") and of AFW Fabric Corp. ("AFW") at February 2, 1975 and the proforma capitalization after giving effect to the proposed merger of the companies. The table assumes the issuance of 1,226,549 common shares of the Company for all the 1,226,549 outstanding AFW common shares and the cancellation of all previously outstanding common shares of the Company. The table also reflects combined proforma additional short-term bank borrowings aggregating \$1,718,000, the proceeds of which are to be used for the payment of \$3 for each of the 559,182 shares of the Company's common stock converted into cash upon consummation of the merger.

	Outstan	ding	Pro Forma	Pro Forma
	The Company	AFW	Adjustments	After Merger
Short-term debt(1):				
Notes payable—banks (average interest rate 11½%)	\$ 900,000	_	_	\$ 900,000
Notes payable—banks (interest at average effective rate of approximately 934%)  Total short-term debt	900,000		\$1,718,000(2) 1,718,000	1,718,000(2) 2,618,000
Long-term debt(3):				
Notes payable—insurance company (including \$600,000 current portion) (interest at 9½% a year; due annually to 1986)	7,200,000 \$ 8,100,000	==	\$1,718,000	7,200,000 \$ 9,818,000
Stockholders' Equity of the Company(5):				
Common Stock—\$1 par value — authorized 3,500,000 shares, outstanding 1,785,731 shares actual and 1,226,549				
shares pro forma	\$ 1,785,731		(\$559,182)	\$ 1,226,549
Additional paid in capital at February 2, 1975	8,613,779		(1,118,364)	7,495,415
Retained earnings at February 2, 1975	3,562,76		_	3,562,763
Total stockholders' equity	\$13,962,2 3		(\$1,677,546)(2)	\$12,284,727
Capital stock of AFW:				
Common Stock — \$.01 par value—authorized 2,000,000 shares, outstanding		1,226,549 shs.	(1,226,549 shs.)	_

<sup>(1)</sup> The Company is generally expected to maintain compensating bank balances equal to 15% to 20% of its average annual bank borrowings. Reference is made to Note E of the notes to financial statements for additional information concerning bank borrowings.

<sup>(2)</sup> Assumes borrowings of approximately \$1,718,000 on a 90 day discount basis to yield net proceeds of \$1,677,546.

<sup>(3)</sup> Reference is made to Note G of the notes to financial statements for additional information concerning restrictions and other provisions of the note agreement with an insurance company.

<sup>(4)</sup> Reference is made to Notes I and L of the notes to financial statements for information regarding lease and related commitments.

<sup>(5)</sup> Reference is made to Notes J and K of the notes to financial statements and to "Cancellation of Stock Options", included elsewhere in this Proxy Statement, for information about stock options.

## CONSOLIDATED STATEMENT OF OPERATIONS

The following consolidated statement of operations of Concord Fabrics Inc. and Subsidiary for the five fiscal periods ended September 1, 1974 has been examined by Eisner & Lubin, independent certified public accountants, whose report thereon appears elsewhere in this Proxy Statement. The statements of operations for the thirteen weeks ended December 2, 1973 and December 1, 1974 are unaudited; however, in management's opinion, all adjustments (which include only normal recurring accruals) have been made which are necessary to present fairly the operating results for such unaudited periods. The consolidated financial statements, with the notes thereto, included elsewhere in this Proxy Statement, should be read in conjunction with this statement. The alphabetical notes indicated below refer to the notes to financial statements.

			Unaudited .				
	Fiscal Year	Thirty-Four	F	Fiscal Year Ende	d	Thirteen W	eeks Ended
	Ended January 3, 1971	Weeks Ended August 29, 1971 (Note 1)	September 3, 1972	September 2, 1973	September 1, 1974	December 2. 1973	December 1, 1974
Net sales	\$52,052,532	\$41,794,393	\$56,429,274	\$63,709,104	\$60,202,396	\$14,319,854	\$15,199,286
Cost of sales (Note 4)	41,060,237	34,308,565	46,823,586	49,892,681	46,976,805	10,900,396	12,515,111
Merchandising expenses	1,871,802	1,251,888	1,783,790	1,693,0:5	1,593,702	447,917	438,017
Selling and shipping expenses	4,964,883	3,671,202	5,682,656	5,323,471	4,422,879	947,162	1,002,357
General and administrative							
expenses	3,171,524	2,396,200	4,048,591	3,755,244	3,870,597	894,086	918,078
Provision for doubtful accounts	13,670		39,797	547,264	648,036	45,000	95,000
Interest expense (Note 6)	543,545	666,528	1,187,972	982,564	1,027,637	181,155	198,241
Total	51,625,661	42,294,383	59,566,392	62,194,279	58,539,0	13,415,716	15,166,804
Earnings or (loss) before pro- vision for loss on closing of warehouse, income taxes, etc	426,871	(499,990)	(3,137,118)	1,514,825	1,663,340	904,138	32,482
Provision for loss on closing of warehouse and other expenses (Note L)				1,200,000	740,000	50,000	
Earnings or (loss) from continuing operations before income taxes and extraordinary item	426,871	(499,990)	(3,137,118)	314,825	923,340	854,138	32,482
Income tax provision or (credit) (Notes D and 7)	222,000	(236,000)	(1,771,000)	90,000	403,000	444,000	17,000
Earnings or (loss) from centinuing operations	204,871	(263,990)	(1,366,118)	224,825	520,340	410,138	15,482
Earnings or (loss) of former sub- sidiary (net of income taxes) (Note 5)	(1,187)	85,681	163,078				
dinary item	203,684	(178,309)	(1,203,040)	224,825	520,340	410,138	15,482
ary (net of \$75,000 income tax			(70.000)				
benefit) (Note 5)			(70.000)				
NET TARNINGS OR (Loss)	\$ 203,684	\$ (178,309)	\$(1,273,040)	\$ 224,825	\$ 520,340	\$ 410,138	\$ 15,482
Earnings or (loss) per share (Note 2):							
From continuing opera-	\$.11	\$(.15)	\$(.76)	Ļ13	\$.29	\$.23	\$.01
Former subsidiary Before extraordinary item	.11	(.10)	(.67)	.13	.29	.23	.01
Extraordinary item			(.04)				
Total	\$.11	\$(.10)	\$(.71)	\$.13	\$.29	\$.23	\$.01
Average number of shares used in computing earnings or loss per share	1,785,731	1,785,731	1,785,731	1,785,731	1,785,731	1,785,731	1.785,731
Cash dividends per share (Notes 3 and 8)	\$.10						

The following notes are made a part hereof.

## NOTES TO CONSOLIDATED STATEMENT OF OPERATIONS

(Information for the Thirteen Weeks Ended December 2, 1973 and December 1, 1974 is Unaudited)

- 1. In 1971, the Company changed its fiscal year to one ending on the Sunday closest to August 31. Accordingly, the fiscal period ended August 29, 1971 comprised thirty-four weeks; the fiscal years ended September 3, 1972 and January 3, 1971 each comprised fifty-three weeks and the other fiscal years each comprised fifty-two weeks.
- 2. Earnings or loss per share are based on the average number of shares outstanding during each period.
- 3. Dividends were not paid to principal stockholders of the Company, who had waived any cash dividends through June 30, 1973.
- 4. The following inventories were used in the computation of cost of sales in the attached statement of operations for the three fiscal years ended September 1, 1974 and the thirteen week periods ended December 2, 1973 and December 1, 1974:

August 30, 1971	\$17,741,266*
September 4, 1972	14,324,182
September 2, 1973	11,344,067
December 2, 1973	13,599,309
September 1, 1974	11,876,636
December 1, 1974	12,704,160

<sup>\*</sup> Excluding inventory of former subsidiary (Note 5).

No physical inventory was taken at December 2, 1973 and December 1, 1974; the inventory quantities at these dates were obtained from perpetual book records.

5. On September 1, 1972, the Company sold the outstanding stock of a former wholly-owned subsidiary, Leonard Machinery Corp. (Leonard), for \$286,064. The loss on the sale of Leonard is reflected as an extraordinary item on the attached consolidated statement of operations.

Leonard sold imported knitting machinery and parts. The operations of Leonard, after elimination of intercompany transactions, were as follows:

	Fiscal Year Ended January 3, 1971	Thirty-Four Weeks Ended August 29, 1971	Fiscal Year Ended September 3, 1972
Net sales	\$482,321	\$4,403,733	\$7,426,237
Costs and expenses	483,508	4,214,052	7,096,159
Earnings or (loss) before income taxes	(1,187)	189,681	330,078
Income taxes: Currently payable:			
Federal		180,000	34,000
State and local		46,000	11,000
Deferred		(122,000)	122,000
TOTAL		104,000	167,000
NET EARNINGS OR (LOSS)	\$ (1,187)	\$ 85,681	163,078
			(continued)

# NOTES TO CONSOLIDATED STATEMENT OF OPERATIONS—(Continued)

- 6. Interest on "Notes payable—insurance company," included in "Interest expense" on the consolidated statement of operations was \$82,500, \$247,500, \$612,500, \$771,800, \$713,792, \$180,909 and \$166,400 for the fiscal periods ended January 3, 1971, August 29, 1971, September 3, 1972, September 2, 1973, September 1, 1974, December 2, 1973 and December 1, 1974, respectively.
  - 7. Income taxes are analyzed as follows:

	Fiscal Year Ended January 3.	Weeks Ended		scal Year End	ed	Thirteen V	Veeks Ended
Currently payable or (refundable):	1971	August 29, 1971	September 3, 1972	September 2, 1973	September 1, 1974	December 2,	December 1,
Federal	31,000	\$ 46,000 (227,000)	\$(1,883,000) (207,000) 227,000		\$ 53,000 13,000 275,000	\$322,450 62,000 50,550	\$(34,000) (3,000) 45,000
Total charged or (credited)		49,000	184,000	48,000	62,000	9,000	9,000
to operations	\$222,000	\$(132,000)	\$(1,679,000) ======	\$ 90,000	\$403,000	\$444,000	\$ 17,000

\* The above deferred income taxes are comprised of approximately 10% state and local income taxes and approximately 90% federal income tax.

The foregoing income taxes are allocated as follows:

	Fiscal Year Ended January 3,	Ended	Thirty-Four Weeks Ended August 29.	Fi	scal Year Ende	ed	Thirteen V	Veeks En ed
Charged or (credited) to continuing	1971	1971	September 3, 1972	September 2,	September 1, 1974	December 2,	December 1.	
Charged to operations of former	\$222,000	\$(236,000)	\$(1,771,000)	\$ 90,000	\$403,000	\$444,000	\$ 17,000	
subsidiary (Note 5)		104,000	167,000 (75,000)	4-				
Total as above	\$222,000	\$(132,000)	\$(1,679,000)		\$403,000	\$444,000	\$ 17,000	

Income taxes for the fiscal years ended September 3, 1972, September 2, 1973 and September 1, 1974 include the benefits of investment credits of approximately \$56,000 (\$.03 per share), \$29,000 (\$.02 per share) and \$16,000 (\$.01 per share), respectively; investment credits in the prior periods were not material.

Attention is directed to Note D for additional information with respect to income taxes.

- 8. Attention is directed to Note G for dividend restrictions pursuant to a loan agreement.
- 9. The results of operations for the thirteen week period ended December 1, 1974 are not necessarily indicative of the results for a full fiscal year because of the seasonal nature of the business.

# Management's Analysis of Results for Fiscal 1972, 1973 and 1974

Management believes that the loss sustained in fiscal 1972 was primarily attributable to large write-downs of knit inventories, which were the result of an extended inventory position during a period of declining yarn prices and increasing competition for the sale of finished knitted fabrics, and to lower sales. Increased general and administrative expenses resulting primarily from a reorgani-

zation of management and increased interest expenses, caused by increased borrowing at higher interest rates, contributed, to a much lesser extent, to the loss.

Profits in fiscal 1973 were adversely affected principally by costs and loss provisions incident to the closing (shortly before the end of the fiscal year) of the Company's North Bergen, New Jersey distribution center (see "Business of the Company—Property" [p. 16]); lack of availability of woven greige goods, continued high warehouse and distribution expenses at the distribution center, and an increased provision for doubtful accounts resulting from the insolvency of a large foreign customer and several domestic accounts also reduced profits.

Profits, although improved in fiscal 1974, continued to be adversely affected primarily by an additional loss provision for the closed New Jersey distribution center (see "Business of the Company—Property" [p. 16] and Note L of notes to financial statements [p. 29]), and also by a larger provision than in the prior years for doubtful accounts, necessitated by the insolvency of several domestic customers and by the uncertain economic conditions prevailing at the end of fiscal 1974. The decrease in selling and shipping expenses was primarily attributable to the discontinuance of operations at the Company's North Bergen distribution center and to a much lesser extent to a reduction in salesmen's commissions because of the decrease in sales volume.

#### Summarized Interim Operating Results and Management's Analysis

The decrease in profits for the 13 weeks ended December 1, 1974 from the comparable prior period was primarily attributable to a reduction in the gross profit margin from 23.9% to 17.7%, which, in management's opinion, was caused principally by a mark-down of knit and woven inventories to reflect lower replacement costs during the period and also by a general weakness in selling prices due to severe competition and customer resistance to prices. The provision for doubtful accounts was increased after a review of the accounts receivable in light of uncertain economic conditions.

The following summarizes the revenues and earnings of the Company and its subsidiary for the 9 week periods ended february 3, 1974 and February 2, 1975 and the 22 week periods ending as at the same dates. The information is unaudited; however, in management's opinion, all adjustments (which only include normal recurring accruals) have been made which are necessary to present fairly the operating results for such unaudited periods.

		(Unau	dited)	
	Nine We	eks Ended	Twenty-two	Weeks Ended
	February 3, 1974	February 2, 1975	February 3, 1974	February 2, 1975
Net sales	\$9,063,122	\$12,508,376	\$23,382,976	\$27,707,662
Earnings before income taxes*	184,661	726,821	1,038,799	759,303
Provision for income taxes	97,000	378,000	541,000	395,000
Net earnings	\$ 87,661	\$ 348,821	\$ 497,799	\$ 364,303
Net earnings per share (based on 1,785,731 shares outstanding)	\$.05	\$.20	\$.28	\$.21

<sup>\*</sup> Includes loss provision in connection with the closed New Jersey distribution center of \$100,000, \$60,000, \$150,000 and \$60,000, respectively.

Gross margins during December and January (i.e. the nine weeks ended February 2, 1975) of the second quarter of fiscal 1975 have been lower than in the same period of 1974 but the increased sales volume and the maintenance of expenses at approximately the same level produced substantially higher profits.

For the second quarter of fiscal 1974 (i.e., the 13 weeks ended March 3, 1974) the Company's sales, net earnings, and net earnings per share were \$14,865,078, \$165,567 and \$.09, respectively. Earnings for

this period were adversely affected by lower profit margins on sales and by a loss provision of \$200,000 (before tax benefit) in connection with the closed N rth Bergen, New Jersey distribution center (see "Business of the Company—Property" [p. 16]). Sales for February 1975 appear to be at the level of those for February 1974, and thus for the second quarter of fiscal 1975 (the 13 weeks ended March 2, 1975) net sales are estimated at approximately \$18,500,000, approximately 25% higher than the second quarter of fiscal 1974. An additional provision of approximately \$30,000 (before tax benefit) will be required for February 1975 as a result of the Company's inability to rent the North Bergen distribution center, compared with a provision of \$100,000 for February 1974. Earnings for the second quarter of fiscal 1975 are expected to be substantially higher than for the second quarter of fiscal 1974.

The results of operations for interim periods are not necessarily indicative of the results for a full fiscal year because of the seasonal nature of the business and changing economic and business conditions (see "Business of the Company—Sales" [p. 15].

#### PRICE RANGE OF COMMON STOCK

The price range of the Company's Common Stock since July 11, 1968 (the date it became publicly held) is set forth below. The prices prior to June 25, 1969 are based on bid prices (adjusted for a stock dividend of 10% on March 27, 1969) in the over-the-counter market as reported by National Quotation Bureau, Incorporated and represent prices between dealers which neither represent actual transactions nor include retail markups, markdowns or commissions. Beginning June 25, 1969, the prices represent sales on the American Stock Exchange.

	High	Low
July 11—December 31, 1968	233/4	131/8
January 2—June 24, 1969	25	171/2
June 25—December 31, 1969	21	121/2
1970	14	37/8
1971	131/4	43/4
1972	81/8	35/8
1973		
First Quarter	51/4	31/2
Second Quarter	4	23/8
Third Quarter	41/4	23/8
Fourth Quarter	3	11/2
1974		
First Quarter	31/4	15/8
Second Quarter	23/4	11/2
Third Quarter	13/4	13/8
Fourth Quarter	15/8	1
1975		
January 2—January 31	13/4	1 1/8
February 3—February 4*	21/8	13/4
February 6—February 28	27/8	25/8
March 3—March 11	25/8	21/2

<sup>\*</sup> The last two full trading days prior to the announcement on February 6, 1975 that the tender offer would be made. Trading was suspended for the full day of February 5, 1975.

On March 3, 1975 AFW announced that it was withdrawing its tender offer for the Company's stock. On March 12, 1975 the closing price of the Common Stock on the American Stock Exchange was \$2½.

#### DIVIDENDS

In 1968, the Company paid two quarterly dividends of \$.10 per share and in 1969 four quarterly dividends of \$.10 per share (before adjustment for the stock dividend) and a 10% stock dividend were paid. In 1970, one quarterly dividend of \$.10 per share was paid. Dividends were not paid to the Messrs. Weinstein, who had waived all cash dividends through June 30, 1973 pursuant to an agreement with the underwriters for the Company's first public offering. No dividends have been paid since

Under a Note Agreement with The Prudential Insurance Company of America ("Prudential"), cash dividends on the Company's stock after December 29, 1968 may not exceed 70% of net earnings since that date, on a cumulative basis; as at February 2, 1975 approximately \$1,154,000 (\$.65 per share) of dividends would be permitted by this provision; the Note Agreement also contains minimum working capital requirements. In connection with the consent of Prudential to the merger of AFW into the Company (see "Source of Funds" [p. 5]), the aggregate amount expended to pay for shares will be included in subsequent calculations for dividends and other restricted payments under the Note Agreement. Accordingly, as at February 2, 1975, after giving pro forma effect to the merger, the Company would have exceeded the amount available for dividends under the Note Agreement by approximately \$524,000; future payment of dividends, after elimination of this deficit, will depend on the Company's earnings, financial condition and other relevant factors.

# THE BUSINESS OF THE COMPANY

The Company was incorporated in New York in 1958 as a successor to a business founded in 1920. The business of the Company is developing, designing and styling woven and knitted fabrics of natural and synthetic fibers in a wide variety of colors and patterns, for sale to manufacturers of apparel and to retailers (including chains, department stores and independently owned fabric stores) for resale to the home sewing market.

#### Sales

Approximately 75% of fabric sales in each of the fiscal years ended September 2, 1973 and September 1, 1974 was to apparel manufacturers; the remaining 25% of fabric sales was to retail stores. Woven fabrics accounted for 72% of sales in fiscal 1974, compared with 75% in fiscal 1973. Knitted fabrics accounted for the remaining 28% of sales in fiscal 1974, compared with 25% in fiscal 1973. The Company is not dependent on any single customer or small group of customers for a significant amount of its sales.

The Company's sales have traditionally been highest from December through March because the Company sells principally cotton and synthetic woven fabrics, used primarily in spring-summer apparel, and does not significantly employ wool, which is used in fall-winter apparel. Although the Company's sales were higher in February and March, 1974 than in any other two-month period of the fiscal year ended September 1, 1974, the Company did not experience its t ditional seasonal sales pattern throughout fiscal 1974, partly because of relatively higher wholesale sales during the first fiscal quarter (ended December 2, 1973) when customers were replenishing stocks depleted by shortages of woven fabrics experienced in fiscal 1973, and partly because of relatively higher retail sales in the fourth quarter resulting from the Company's increased efforts during the year to improve retail sales.

#### Production

All of the Company's woven fabrics are made from natural and synthetic fibers by independent contractors, who in many instances produce the greige goods in accordance with the Company's specifications. Independent finishing plants then print or dye and finish the greige goods, also in accordance with the Company's specifications.

The Company's Milledgeville, Georgia knitting, dyeing and finishing plant has about 60 knitting machines producing about 70% of the Company's requirements of knitted fabrics; the balance is produced by independent contractors. The plant also contains equipment for finishing and dyeing the fabrics knitted at the plant and a large portion of the fabrics knitted by independent contractors for the Company. The plant has space available for additional knitting machines.

Due to shortages of woven greige goods, the Company experienced difficulty in obtaining adequate supplies of such goods during most of fiscal 1973 and the first quarter of fiscal 1974. The shortages eased during the second quarter of fiscal 1974 and the Company is presently able to obtain adequate supplies of woven greige goods without difficulty.

#### **Employees**

The Company employs about 375 persons. In connection with the closing of the Company's North Bergen, New Jersey distribution center in August, 1973 (see "Property" [p. 16]) and its Los Angeles warehouse in September, 1973 the Company terminated the employment of the warehouse workers at those facilities. In August, 1973, District 65 of the Distributive Workers of America, the union which represented the warehouse employees and approximately 80 office personnel employed at the Company's principal office in New York, filed a complaint with the National Labor Relations Board, alleging an unfair labor practice by the Company, and in September, 1973 commenced a strike against the Company. In October, 1973 the National Labor Relations Board dismissed the union's complaint, and an appeal from the dismissal of the complaint was denied in April, 1974. The strike is still continuing, but to date it has not had a material adverse effect on the Company's business.

#### Property

The Company owns in fee a 3½ year old knitting and finishing plant consisting of approximately 110,000 square feet on one floor situated on approximately 60 acres of land in Milledgeville, Georgia.

The Company has a lease expiring in 1984 for one floor and a part of a second floor at 1411 Broadway, New York, New York consisting of approximately 53,200 square feet, of which it uses which the Company no longer requires has been sublet for terms expiring in 1978 (1,700 square feet) and 1984 (16,900 square feet).

In April, 1971 the Company commenced using a distribution center, containing approximately 160,000 square feet, in North Bergen, New Jersey, under a lease expiring in 1996. The Company terminated its warehouse operations there in August, 1973 and disposed of the equipment located in the facility, but to date has not been successful in re-letting the space. In November, 1974 the Company will remain liable for the premises pursuant to an agreement with the lessor under which the Company will remain liable for the rent and expenses of maintaining the property until the expiration of the lease in 1996 unless certain conditions are met, including the re-letting of the building for a minimum term of 10 years at a net annual rental of at least \$1.60 per square foot. Efforts to re-let the distribution center

#### Competition

Many firms, no one of which is dominant, are in competition with the Company in price, product, quality and service. The Company is in competition both with firms whose function is limited to the

conversion of greige goods and yarn into finished fabrics, and with integrated textile companies that manufacture, as well as convert, greige goods and yarns. The Company believes that it is one of the largest firms in the category of nonintegrated converters, but in the category of integrated firms there are a number of companies that have significantly larger sales and financial resources than the Company.

# Officers and Directors

The following table lists the officers and directors c. the Company and their positions with the Company or with other concerns:

Name of Director or Offic- Alvin Weinstein  Frank Weinstein	Principal Occupation  Director; Chairman of the Board of the Company  Director; Chairman of the Executive Committee of the Company
David R. Caplan  Dr. Charles M. Edwards, Jr.  George Gleitman  Ben Heller	Director; President of the Company  Director; Dean Emeritus of the Institute of Retail  Management, New York University  Director; Vice President of the Company and President of its Retail Division
Earl Kramer  Murray Rucker  Martin Wolfson	Director; President, Ben Heller, Inc. (art dealer) Director; President of the Company's Knit Division Vice President of the Company Director; Secretary and Treasurer of the Company

# CANCELLATION OF STOCK OPTIONS

David Caplan and Earl Kramer, who are directors and officers of the Company and the holders of non-qualified stock options to purchase 50,000 and 30,000 shares, respectively, of the Company's Common Stock, George Gleitman and Martin Wolfson, who are directors and officers of the Company and holders of qualified stock options to purchase 12,625 shares and 1,800 shares, respectively, and Murray Rucker, who is an officer of the Company and the holder of a qualified stock option to purchase 5,000 shares, as well as all other holders of qualified stock options (aggregating 13,850 shares) have entered into agreements with the Company pursuant to which all such options will be cancelled upon the consummation of the merger. Within ten days after the consummation of the merger, the Company will pay to each holder of qualified stock options an amount equal to the greater of \$.25 per share or the excess (if any) of \$3 over the exercise price for the option, regardless of whether the option was exercisable prior to the merger. Messrs. Caplan and Kramer will not receive any payments and Messrs. Gleitman, Wolfson and Rucker will receive \$3,156.25, \$450 and \$8,125, respectively, for their options. An aggregate of \$17,100 will be paid to the holders of qualified stock options.

# INFORMATION CONCERNING AFW

AFW, a New York corporation, was organized in January, 1975 for the purpose of making a tender offer for the Company's shares and then causing a merger of AFW and the Company. In February, 1975 AFW acquired all of the shares of the Company's Common Stock owned by the Messrs. Weinstein and seven trusts of which Frank Weinstein is trustee or co-trustee (in one trust he is also the income beneficiary and in the other trusts the children of Alvin Weinstein have remainder interests) in exchange for shares of AFW's Common Stock. As a result of this exchange, AFW owned 1,226,549 shares of the Company's Common Stock representing approximately 68% of the outstanding shares.

The Messrs. Weinstein and the trusts are the sole shareholders of AFW; Alvin Weinstein owns 611,147 shares of AFW's stock, Frank Weinstein owns 611,024 shares and the trusts own an aggregate of 4,378 shares (Frank Weinstein may also be considered to own beneficially 2,200 of the shares held by the trust of which he is a trustee and the income beneficiary). The Messrs. Weinstein and Joan (Mrs. Alvin) Weinstein are the directors of AFW; Alvin Weinstein is the President and Treasurer and Frank Weinstein is Vice President and Secretary of AFW. Alvin Weinstein's present principal position is Chairman of the Board and chief executive officer of the Company; Frank Weinstein's present principal position is Chairman of the Executive Committee of the Company; Joan Weinstein's present principal position involves promotional and marketing work for the Company.

#### **MISCELLANEOUS**

#### Transactions in Company's Common Stock

Other than the transfer by the Messrs. Weinstein of their shares to AFW, none of AFW, the Messrs. Weinstein and the other officers and directors of the Company has effected any transactions in the Company's stock during the past sixty days. The present officers and directors of the Company have not effected any transactions in the Company's stock during the past two years, except as follows: In October 1974 Alvin and Frank Weinstein each re-purchased, at a price of \$4 per share, 2,500 shares of the Company's common stock from each of George Gleitman and two other former officers and directors of the Company, pursuant to agreements giving such persons the right to sell the shares to the Messrs. Weinstein at that price; in November 1974 Mr. Gleitman purchased, at the prevailing market price, 1,375 shares from a former officer and director of the Company; and in December 1974 Dr. Charles M. Edwards, Jr. sold 110 shares at the prevailing market price. Mr. Gleitman has paid the Company \$4001.25, representing the "short-swing" profit resulting from his transactions.

#### Solicitation and Other Fees

The Company will not pay any fees to any broker, dealer, bank or trust company for soliciting proxies. The Company will, however, reimburse such persons for their out-of-pocket expenses in forwarding the notice of meeting, proxy and proxy statement to the beneficial owners of the shares. The Company estimates that its expenses in connection with the proposed merger will be approximately \$87,000, including printing and mailing costs of \$17,000, legal fees of \$40,000, accounting fees of \$10,000, and transfer agent charges of \$20,000. The foregoing total does not include expenses which may be incurred in connection with the litigation referred to herein or in connection with appraisal proceedings involving dissenting shareholders.

March 17, 1975

# EXHIBIT 4 TO AFFIDAVIT OF SIDNEY J. SILBERMAN - PROXY STATEMENT ISSUED BY CONCORD FABRICS INC.

#### REPORT OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANTS

To the Board of Directors and Shareholders .
Concord Fabrics Inc.

We have examined the consolidated balance sheet of Concord Fabrics Inc. and Subsidiary as at September 1, 1974, the related consolidated statements of operations and changes in financial position for the five fiscal periods ended September 1, 1974 and the consolidated statement of retained earnings for the three fiscal years ended September 1, 1974. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the aforementioned financial statements present fairly the consolidated financial position of Concord Fabrics Inc. and Subsidiary at September 1, 1974 and the consolidated operating results and changes in financial position for the periods indicated above, in conformity with generally accepted accounting principles applied on a consistent basis except for the change, which we approve, in the method of computing depreciation, effective January 4, 1971, as described in Note A(3) to the financial statements.

EISNER & LUBIN
Certified Public Accountants

New York, New York November 19, 1974

# CONCORD FABRICS INC. AND SUBSIDIARY

# ' CONSOLIDATED BALANCE SHEET

#### ASSETS

ASSEIS		
	Audited	Unaudited
	September 1,	December 1,
Current assets:	1974	1974
Cash (Note E)	\$ 1,295,967	\$ 74,792
Accounts receivable (less estimated doubtful accounts of \$485,000	φ 1,293,907	\$ 74,792
at September and \$597,838 at December)	15,380,402	14,366,913
Inventories (Notes A(2) and B)	11,876,636	12,704,160
Prepaid expenses and other current assets	953,155	831,478
Deferred income taxes (Note D)	190,000	145,000
Total current assets	29,696,160	28,122,343
Property, plant and equipment (at cost, less depreciation and amortization of \$1,141,584 at September and \$1,230,510 at December)		
(Notes A(3), A(4), C and L)	3,381,768	3,349,103
Other assets	132,867	54,041
Total	\$33,210,795	\$31,525,487
LIABILITIES		
Current liabilities:		
Notes payable—banks (Note E)	\$ 4,200,000	\$ 450,000
Accounts payable	6,105,118	8,184,405
Accrued expenses and taxes	1,764,707	1,708,630
Income taxes (Notes A(3), A(4) and D)	-, -, -	17,000
Current portion of notes payable—insurance company (Note G)	600,000	600,000
Total current liabilities	12,669,825	10,960,035
Notes payable-insurance company (less current portion above)		,,
(Note G)	6,600,000	6,600,000
Deferred income taxes (Notes A(3) and D)	343,000	352,000
Total liabilities	19,612,825	17,912,035
Commitments and contingencies (Notes G, I, K and L)		
STOCKHOLDERS' EQUIT (Notes G, J, K and M)	Y	
Common stock—\$1 par value—authorized 3,500,000 shares, issued		
1,785,731 shares	1,785,731	1,785,731
Additional paid-in capital	8,613,779	8,613,779
Retained earnings (statement attached)	3,198,460	3,213,942
Total stockholders' equity	13,597,970	13,613,452
TOTAL	\$33,210,795	\$31,525,487
The notes to financial statements and the	- 1 - 1	
The notes to financial statements are made a pa	rt nereot.	

# CONCORD FABRICS INC. AND SUBSIDIARY

#### CONSOLIDATED STATEMENT OF RETAINED EARNINGS

			Unaudited	
	Audited		Thirteen	
	Fiscal Year Ende	d	Weeks Ended	
September 3, 1972	September 2, 1973	September 1, 1974	December 1, 1974	
\$3,726,335	\$2,453,295	\$2,678,120	\$3,198,460	
(1,273,040)	224,825	520,340	15,482	
\$2,453,295	\$2,678,120	\$3,198,460	\$3,213,942	
	September 3, 1972 \$3,726,335 (1,273,040)	Fiscal Year Ender September 3, 1972 September 2, 1973 \$3,726,335 \$2,453,295 (1,273,040) 224,825	Fiscal Year Ended  September 3, September 2, 1973 September 1, 1974  \$3,726,335 \$2,453,295 \$2,678,120  (1,273,040) 224,825 520,340	

The notes to financial statements are made a part hereof.

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# CONCORD FABRICS INC. AND SUBSIDIARY CONSOLIDATED STATEMENT OF CHANGES IN FINANCIAL POSITION

		ATEMENT C	Audited		CIAL POSIT		
	Fiscal Year Ended	Thirty-Four Weeks Ended		Fiscal Year En	nded		udited
Working capital was provided by	January 3	August 29, 1971	September 3	, September 2,	September 1,		Weeks Ended December 1.
Operations: Earnings or (loss) before			1972	1973	1974	1973	1974
extraordinary item Eliminate items not requir- ing the use of working	. \$ 203,684	\$ (178,309)	\$(1,203,040)	\$ 224,825	\$ 520,340	\$ 410,138	\$ 15,482
capital: Depreciation Deferred income tax	١.	166,119	404,285	455,735	361,226	89,611	90,027
Credits Write-down of New	,	49,000	184,000	48,000	62,000	9,000	-9,000
Jersey warehouse assets (Note L)				760,000			
Balance before ex- traordinary item Extraordinary item Total provided by	330,588	36,810	(614,755) (70,000)		943,566	508,749	114,509
or (used for) operations Noncurrent portion of notes	330,588	36,8.0	(684,755)	1,488,560	943,566	508,749	114,509
payable—insurance company (Note G)  Decrease or (increase) in other	2 000 000	4,000,000	1,800,000				
Sale of equipment and esti-	(431,181)	228,725	(72,236)	335,530	16,947	92,686	78,826
warehouse assets	1 899,407	4,265,535	1,043,009	<u>413,170</u> <u>2,237,260</u>	960,513	601 435	102 225
Working capital was used for: Reduction of noncurrent por- tion of notes payable—insur- ance company (Note G)					900,313	601,435	193,335
and equipment (net)	888,9,2	3,081,908	791,953	600,000	600,000	227.040	
Total	53,418 942,410	3,001,908	791,953	1,074,635	216,935	225,960	57,362
NET INCREASE IN WORKING CAPITAL	956,997	1,183,627	251,056	1,162,625	816,935	225,960	57,362
period	13,328,452	14,285,449	15,469,076	15,720,132	143,578 16,882,757	375,475 16,882,757	135,973
WORKING CAPITAL—END OF PERIOD  The net increases or (decree	\$14,285,449	\$15,469,076	\$15,720,132	\$16.882.757	\$17,026,335	\$17,258,232	17,026,335 \$17,162,308
The net increases or (decrea	Fiscal Year		Audited	pital are:		Unau	dited
	Ended January 3.	Thirty-Four Weeks Ended Fiscal Year Ended		d	Thirteen W	eeks Ended	
Current assets:	\$ 85,305	1971	September 3,	1973	September 1, 1974	December 2, 1973	December 1, 1974
Accounts receivable (net) Indebtedness due from former subsidiary	(1,395,487)	\$ 261,919 (1,752,600)	\$( 30,708) 75,856	\$( 675,934) 1,544,447	\$ 433,107 2,441,656	\$( 425,966) 94,469	\$(1,221,175) (1,013,489)
Income tax refunds receivable Inventories Prepaid expenses and other	505,788 3,130,203	( 254,288) 147,355	538,087 1,929,000 (3,417,084)	(538,087) (2,135,000) (2,980,115)	532,569	2,255,242	827,524
current assets Deferred income taxes Net current assets of former subsidiary	535,192 90,000	( 54,490) 15,000	( 82,268) ( 105,000)	114,812 465,000	478,943 ( 275,000)	( 181,339) ( 50,550)	( 121,677) ( 45,000)
Total	2,951,001	(628,799) (2,265,903)	(113,126) (1,205,243)	(4,204,877)	3,611,275	1,691,856	(1,573,817)
Notes payable—banks Accounts payable Accrued expenses and taxes Income taxes Current portion of notes payable	2,100,000 151,641 ( 13,767) ( 243,870)	( 600,000) (2,819,304) ( 30,226)	(1,500,000) (676,396) 120,097	(7,500,000) 715,093 897,405 520,000	4,200,000 ( 139,632) ( 72,671) ( 520,000)	1,488,424 ( 132,051) ( 39,992)	(3,750,000) 2,079,287 (56,077) 17,000
able—insurance company Total Net Increase in Working Capital	1,994,004 \$ 956,997	(3,449,530) \$ 1,183,627			3,467,697 \$ 143,578	1,316,381 \$ 375,475	(1,709,790) \$ 135,973
Ti	ne notes to fir	nancial staten	nents are ma	de a part he	reof.	-	

# CONCORD FABRICS INC. AND SUBSIDIARY

# NOTES TO FINANCIAL STATEMENTS

(Information for Transactions Subsequent to September 1, 1974 and for the Thirteen Weeks Ended December 2, 1973 is Unaudited)

# NOTE A-Summary of Significant Accounting Policies:

- (1) Principles of Consolidation—The financial statements include the accounts of Concord Fabrics Inc. (the Company) and its wholly-owned subsidiary; intercompany investments, advances and transactions have been eliminated.
- (2) Inventories—Inventories are stated at lower of cost or market, first-in, first-out; obsolete inventory items are carried at estimated net realizable value (Note B). Cost comprises materials, direct
- (3) Property and Depreciation—Property, plant and equipment is recorded at cost. At the tine assets are sold or otherwise disposed of, the cost and accumulated depreciation are eliminated from the asset and depreciation accounts; profits and losses on such dispositions are reflected in current operations. Fully depreciated assets are written off against accumulated depreciation.

Expenditures for maintenance, repairs, renewals and betterments are reviewed by management and only those items representing improvements to property, plant and equipment are capitalized; other items are charged to current operations.

To January 3, 1971, depreciation for both financial accounting and income tax purposes was computed substantially at accelerated rates (other than depreciation of leasehold improvements which was computed at straight-line rates). Depreciation of additions after January 3, 1971 is computed at straight-line rates for financial accounting purposes; for income tax purposes accelerated methods continue in use. Provision has been made for deferred income taxes resulting from the difference between depreciation for financial accounting and income tax purposes (Notes C and D). The change in depreciation decreased the net loss for the thirty-four weeks ended August 29, 1971 by \$37,000 (\$.02 per share).

(4) Income Taxes—Income tax expense is reduced by investment credits in the year utilized.

The Company's wholly-owned subsidiary is qualified as a domestic international sales corporation; accordingly, 50% of its net earnings are not subject to current income taxes. No provision is made for deferred income taxes on such earnings since management intends to permanently reinvest them.

(5) Stock Options—The Company makes no charge to operations in connection with options granted and shares issued under its qualified stock option plan (Note J). Compensation costs involved in stock options granted pursuant to employment contracts (Note K) are charged to operations over the terms of such contracts. There were no charges to operations in this connection for the two fiscal years ended September 1, 1974 and the thirteen week periods ended December 1, 1974 and December 2, 1973, charges to operations for the fiscal year ended September 3, 1972 (first year of employment contracts) were not material.

## NOTE B-Inventories:

Inventories are summarized by categories as ollows:

	Septembe, 1, 1974	December 1, 1974
Finished goods		\$ 5,597,850
Work-in-process	1,224,059	1,913,762
Greige goods and yarn	5,589,619	5,192,548
Total	\$11,876,636	\$12,704,160

# CONCORD FABRICS INC. AND SUBSIDIARY NOTES TO FINANCIAL STATEMENTS—(Continued)

# NOTE C-Property, Plant and Equipment:

Property, plant and equipment is summarized as follows:

	September 1, 1974	December 1, 1974	Estimated Useful Life
Land	\$ 78,503	\$ 78,503	
Building	1,559,819	1,559,819	40 years
Machinery and equipment	2,194,391	2,245,522	7 to 9 years
Furniture and fixtures	239,157	239,774	10 years
Leasehold improvements	451,482	455,995	Term of lease or life of asset
Total	4,523,352	4,579,613	
Less depreciation and amortization	1,141,584	1,230,510	
Balance	\$3,381,768	\$3,349,103	

#### Note D-Income Taxes:

(1) Income taxes, computed at the statutory federal income tax rate, is reconciled to the provision for income taxes as follows:

	Fise	Fiscal Year Ended			eeks Ended
	September 3, 1972	September 2, 1973	September 1, 1974	December 2, 1973	
In ome tax provision or (credit) at statutory federal income tax rate	\$(1,417,000)	\$145,000	\$437,000	\$410,000	\$16,000 1,000
Effect of:				0.,030	1,000
State and local income taxes (net of federal income tax effect)	(60,000)	8,000	14,000		
	(56,000)	(29,000)	(16,000)		
Permanently reinvested earnings of do- mestic international sales corporation (Note A(4))	(4,000)	(34,000)	(32,000)		
Carryback of loss to a year in which the		(07,000)	(32,000)		
in effect	(142,000)				
TOTAL	\$(1,679,000)	\$ 90,000	\$403,000	\$444,000	\$17,000

<sup>\*</sup> For interim periods, an estimated combined effective state, local and federal intome tax rate of 529 is utilized.

# CONCORD FABRICS INC. AND SUBSIDIARY NOTES TO FINANCIAL STATEMENTS—(Continued)

## NOTE D-Income Taxes-(Continued):

(2) Deferred tax expense results from timing differences in recognition of expense for tax and financial statement purposes. The sources of these differences and the tax effects thereof were as follows:

Fis	scal Year Ended		Thirteen We	ers Ended
September 3, 1972	September 2, 1973	September 1, 1974		
\$184,000	\$ 48,000	\$ 62,000	\$ 9,000	\$ 9,000
	(290,000)	290,000	50,550	
227,000	(175,000)	(15,000)		45,000
\$411,000	\$(417,000)	\$337,000	\$59,550	\$54,000
	\$184,000 \$227,000	\$184,000 \$ 48,000 (290,000) (275,000)	September 3, 1972         September 2, 1973         September 1, 1974           \$184,000         \$ 48,000         \$ 62,000           (290,000)         290,000           (275,000)         (15,000)	September 3, 1972         September 2, 1973         September 1, 1974         December 2, 1973           \$184,000         \$ 48,000         \$ 62,000         \$ 9,000           (290,000)         290,000         50,550           (175,000)         (15,000)

The foregoing deferred income taxes are allocated as follows:

	Fis	ca! Year Ended		Thirteen We	eks Ended
	September 3, 1972	September 2, 1973	September 1, 1974	December 2,	
Current debits	\$227,000 184,000	\$(465,000) 48,000	\$275,000 62,000	\$50,550 9,000	\$45,000
Total as above	\$411,000	\$(417,000)	\$337,000	\$59,550	\$54,000

(3) The Company's federal income tax return for fiscal 1972 is being examined by the Treasury Department. In management's opinion, there will not be any material assessments for 1972 and subsequent years.

## NOTE E-Notes Payable-Banks:

At December 1, 1974, the Company had total unused bank lines of credit aggregating \$7,050,000. Amounts borrowed are generally due in 30 to 90 days. The line of credit arrangements are informal and are cancellable at the banks' option. The Company is generally expected to maintain compensating bank balances (computed on an average annual basis) equal to 15% to 20% of its average annual bank borrowings. The Company has been in substantial compliance with its compensating balance arrangements; withdrawal of bank balances is not legally restricted. The terms of certain of the borrowings grant to the banks a lien and/or right of set-off of cash on deposit and other Company property which may come into the banks' possession.

Interest on amounts outstanding at December 1, 1974 averages 11.2% a year. During the thirteen weeks ended December 1, 1974, the maximum amount of notes payable outstanding at any one time was \$4,200,000; the average of the notes payable outstanding during this period (based upon daily balances) was \$1,845,000 and the weighted average interest rates approximated 12.9% a year.

Interest on amounts outstanding at September 1, 1974 averages 12.6% a year. During the year ended September 1, 1974, the maximum amount of notes payable outstanding at any one time was \$5,100,000; the average of the notes payable outstanding during the year (based upon daily balances) was \$2,920,000 and the weighted average interest rates approximated 11.2% a year.

## CONCORD FABRICS INC. AND SUBSIDIARY

NOTES TO FINANCIAL STATEMENTS-(Continued)

#### NOTE F-Profit-Sharing Plan:

The Company's noncontributory profit-sharing plan, approved by the Treasury Department, for the benefit of eligible full time employees, provides for an annual contribution to a trust fund, at the sole discretion of the Board of Directors, limited to the maximum amount deductible for federal income tax purposes. A contribution of \$75,000 was made for the fiscal year ended September 1, 1974; no contributions were made for the four fiscal periods ended September 2, 1973. A contribution of \$32,500 was accrued in each of the thirteen week periods ended December 2, 1973 and December 1, 1974.

## NOTE G-Notes Payable-Insurance Company:

The agreement with The Prudential Insurance Company of America (Prudential) requires minimum working capital (\$15,000,000 to August 31, 1976 and \$16,000,000 thereafter) and continuity of management, prohibits pledging of assets and restricts borrowings, loans and leases. In addition, cumulative payments for cash dividends and redemption of capital stock are limited to 70% of net earnings (as defined) subsequent to December 29, 1968. Retained earnings not subject to restrictions aggregated approximately \$910,000 at December 1, 1974; notwithstanding, Prudential has consented to the repurchase of capital stock up to an aggregate of \$1,750,000, provided that such amount will be included in subsequent calculations for restricted payments.

The Company's indebtedness to Prudential is payable \$600,000 annually through July 1, 1986 with interest at 91/4% a year. However, Prudential has advised the Company that the liens and right of set-off, referred to in Note E, constitute a violation of the loan agreement, but has agreed that the Company may continue to borrow from the banks under these provisions until July 1, 1976.

## NOTE H-Officers' Life Insurance:

The Company is the beneficiary of \$1,000,000 insurance policies on the life of each of its two principal officers.

#### NOTE I-Leases:

A lease for showroom and office space expires December 31, 1984 and provides for a basic annual rental (net of approximately \$230,000 sublease income) of approximately \$248,000, plus escalation charges. The Company also leases various equipment under short-term leases.

Rent expense comprises the following:

	Fiscal Year Ended			Thirteen Weeks Ended	
	September 3,	September 2, 1973	September 1, 1974	December 2, 1973	December 1, 1974
Showroom and office	\$ 535,000	\$ 590,000	\$635,000	\$145,000	\$155,000
Short-term equipment rental	180,000	200,000	215,000	45,000	90,000
Warehouses	505,000	320,000	_	_	_
Total	1,220,000	1,110,000	850,000	190,000	245,000
Less sublease income	120,000	185,000	245,000	50,000	60,000
Net	\$1,100,000	\$ 925,000	\$605,000	\$140,000	\$185,000

Attention is directed to Note L for information with respect to the Company's obligations in connection with its former New Jersey warehouse premises.

#### CONCORD FABRICS INC. AND SUBSIDIARY

#### NOTES TO FINANCIAL STATEMENTS-(Continued)

### NOTE J-Stock Option Plan:

The Company's qualified stock option plan provides for the granting to officers and other key employees of options to purchase shares of common stock at not less than fair market value on the date of grant.

The following tabulation summarizes the option transactions during the three fiscal years ended September 1, 1974 and the thirteen weeks ended December 1, 1974:

	Number of Shares		
	Under Option	Available for Option	
Balance August 30, 1971	77,625	58,515	
Options granted	29,150	(29,150)	
Options terminated	(67,275)	67,275	
Balance September 1, 1974	39,500	96,640	
Options granted	5,000	(5,000)	
Options terminated	(100)	100	
Balance December 1, 1974	44,400	91,740	

The Company has reserved 136,140 shares of common stock for issuance upon exercise of qualified stock options outstanding and available to be granted.

Options outstanding at December 1, 1974 are as follows:

				Option Prices and Market Prices at Dates of Grant		
Number of Shares	Date Option Granted		Years Exercisable	Per Share	Total	
1,000	June	15,	1970	1971 - 1975	\$5.75	\$ 5,750
22,400	January	11,	1971	1975 - 1976	6.50	145,600
1,000	January	11,	1971	1972 - 1976	6.50	6,500
4,000	January	5,	1972	1973 - 1977	6.25	25,000
,500	January	9,	1973	1974 - 1978	4.75	7,125
3,000	February	6,	1973	1974 - 1978	4.25	12,750
5,000	September	18,	1973	1974 - 1978	2.75	13,750
1,500	December	12,	1973	1974 - 1978	2.00	3,000
5,000	September	3,	1974	1975	1.375	6,875
44,400						\$226,350

# CONCORD FABRICS INC. AND SUBSIDIARY NOTES TO FINANCIAL STATEMENTS—(Continued)

# NOTE J-Stock Option Plan-(Continued):

During the three fiscal years ended September 1, 1974 and the thirteen weeks ended December 1, 1974 options became exercisable as follows:

	Fisal Year Ended			Thirteen Weeks Ended
Options which became exercisable:	September 3, 1972	September 2, 1973	September 1, 1974	December 1, 1974
Number of shares Option price:	1,020	1,240	2,100	2,500
Per share	\$5.75 to \$6.50 \$6,480	\$5.75 to \$6.50 \$7,710	\$4.25 to \$6.50 \$11,425	\$2.75 \$6,875
Per share Total	\$4.25 to \$7.75 \$7,205	\$2.75 to \$5.13 \$5,760	\$1.75 to \$2.75 \$ 4,462	\$1.375 \$3,437

Attention is directed to "Cancellation of Stock Options" elsewhere in this Proxy Statement, for information as to the proposed cancellation of qualified stock options.

## NOTE K- Employment Contracts:

The Company's employment contracts with four officers provide for basic annual salaries aggregating \$310,000 a year plus bonuses based on earnings (as defined); the contracts expire at various dates through December 31, 1976. Additional compensation earned for the fiscal year ended September 1, 1974 aggregated \$52,000; there was no additional compensation for prior years. Additional compensation accrued for the thirteen week periods ended December 2, 1973 and December 1, 1974 aggregated \$15,000 and \$10,000, respectively.

One of the officers was granted an option to purchase 50,000 shares of common stock, exercisable in installments to June 30, 1975. The exercise price is \$4.875 a share, less an amount equal to any increase in the market price of the stock; in addition, the officer is to receive for each share purchased an amount equal to the excess of the market price at the date of exercise over the exercise price.

Another of the aforementioned officers was granted an option to purchase 20,000 shares of common stock exercisable in installments to May 31, 1976. The exercise price is \$3.625 a share and may be reduced to not less than \$1.00 a share based upon increases in the market price of the stock. If the pretax profits of the Company's Knit Division exceed a specified amount in the fiscal year ending in 1975, this option shall extend to an additional 10,000 shares.

The market price of the common stock on December 1, 19,4 was \$1.38 a share. None of the stock options granted pursuant to the employment agreements have been exercised.

Additional information with respect to these nonqualified stock options is summarized as follows:

Number			Option Price at Date of Grant		Quoted Market at Date of Grant	
of Shares	Date Option Granted	Years Exercisable	Per Share	Total	Per Share	Total
50,000 20,000	August 11, 1971 June 13, 1972	1973-1975 1973-1976	\$4.875* 3.625*	\$243,750* 72,500*	\$6.00 4.25	\$300,000

<sup>\*</sup> As described above, the exercise price is subject to reduction based on the quoted market price of the Company's stock at the dates exercised.

# CONCORD FABRICS INC. AND SUBSIDIARY NOTES TO FINANCIAL STATEMENTS—(Continued)

# Note K-Employment Contracts-(Continued):

	Fiscal Year Ended		
Options which became exercisable:	September 2, 1973	September 1, 1974	
Option price:	16,666	16,667	
Per share Total Market price at dates became exercisable:	\$3.75 to \$4.875 \$73,748	\$3.625 to \$4.875 \$72,918	
Per share Total  Options became exercisable during the record in Co.	\$3.00 to \$4.25 \$62,498	\$1.63 to \$1.75 \$27,917	

No options became exercisable during the year ended September 3, 1972 and during the thirteen weeks ended December 1, 1974 and no options were exercised from August 30, 1971 to December 1, 1974.

Attention is directed to "Cancellation of Stock Options", elsewhere in the Proxy Statement, for information as to the proposed cancellation of the foregoing options.

# Note L—Provision for Loss on Closing of Warehouse and Other Expenses:

In 1973, the Company discontinued the occupancy of the New Jersey warehouse. In 1974, it surrendered the lease for such premises to the landlord, and agreed to indemnify the landlord against loss resulting from the acceptance of such surrender unless the owner of the property rents the premises to a new tenant at a rental in excess of the current rental and for a period of at least 10 years. The lease was to expire in 1996 and the annual cost thereunder presently aggregates approximately \$360,000.

The statement of operations for the fiscal year ended September 2, 1973 reflects a \$1,200,000 provision for loss on closing the warehouse, including the write-down of warehouse equipment and a profor the fiscal year ended September 1, 1974 reflects an additional provision of \$740,000 for an estimated vacancy period and other expenses.

# Note M-Proposed Merger:

Attention is directed elsewhere herein for information as to the proposed merger with AFW Fabric Corp.

#### EXHIBIT A

Plan of Merger dated February 12, 1975 between Concord Fabrics Inc., a New York corporation ("Concord") and AFW Fabric Corp., a New York corporation ("AFW").

The parties deem it advisable that AFW be merged into Concord as provided herein. It is therefore agreed as follows:

- 1. Concord was incorporated in New York on June 19, 1958. Its authorized capital stock consists of 3,500,000 shares of Common Stock of the par value of \$1 per share of which 1,785,731
- AFW was incorporated in New York on January 29, 1975. Its authorized capital stock consists of 2,000,000 shares of Common Stock of the par value of \$.01 per share, of which 1,226,549 shares are outstanding.
- 3. As soon as practicable after this Plan has been approved by the shareholders of Concord and AFW, such documents as may be required by the Business Corporation Law of New York shall be appropriately signed, verified and filed in the manner provided in such statute. The term "Effective Date" as used herein shall mean the date on which such documents were so filed.
- 4. Approval of this Plan shall require the affirmative vote of two-thirds of the outstanding shares of Common Stock of Concord and two-thirds of the outstanding shares of Common Stock of AFW.
- 5. On the Effective Date AFW shall be merged into Concord and the separate corporate existence of AFW shall cease. Concord shall be the surviving corporation and shall continue to be governed by the laws of New York.
- 6. (a) Each issued and outstanding share of Concord Common Stock owned by any holder other than AFW shall, by virtue of the merger, be forthwith cancelled and the holders shall cease to have any rights with respect thereto; and in lieu thereof the holder of such shares shall, upon surrender of the same after the Effective Date duly endorsed in such manner and at such place as Concord shall require, be entitled to receive cash at the rate of \$3 per share for each share held.
- (b) Each issued and outstanding share of Concord Common Stock owned by AFW shall, by virtue of the merger, be forthwith cancelled.
- (c) Each share of AFW Common Stock, which shall be outstanding immediately prior to the Effective Date shall, by virtue of the merger and without any action on the part of the holder thereof, become one share of Concord Common Stock.
- 7. This Plan may be terminated and the merger provided for herein may be abandoned by AFW, if prior to the Effective Date, (i) there shall have been instituted or threatened any action or proceeding before any court or administrative agency by any government agency or any other person (A) which challenges or otherwise relates to the proposed merger of the Company and AFW, or (B) which, in the judgment of AFW, might materially adversely affect the Company, or AFW or its officers, directors or shareholders; or (ii) there shall have been declared any state of war or banking moratorium or suspension of business by banks in the United States or a general suspension of or limitation on prices for trading on the New York or American Stock Exchange, or (iii) there shall have been, in the judgment of AFW, a material adverse change in the business, financial condition or operations of the Company.
- 8. No changes shall be effected in the certificate of incorporation of Concord, the surviving corporation.

CONCORD FABRICS INC.

By: /s/ DAVID CAPLAN

AFW FABRIC CORP.

By: /s/ Frank Weinstein

#### SHEARSON HAYDEN STONE INC.

February 5, 1975

The Board of Directors
CONCORD FABRICS INC.
1411 Broadway
New York, New York 10018

Attention: Mr. ALVIN WEINSTEIN

#### Gentlemen:

We have been advised that Messrs. Alvin Weinstein and Frank Weinstein have recently caused to be organized a New York corporation, AFW Fabric Corporation, (the "Purchaser") for the purpose of making a purchase offer (the "Offer") for all of the outstanding Shares of Common Stock (\$1 par value) of Concord Fabrics Inc. ("Concord") other than those owned by the Purchaser as a consequence of the exchange by the Messrs. Weinstein and seven trusts of which Frank Weinstein is trustee or a co-trustee (the "Weinstein Interests") of all of their shares of Concord Common Stock (1,226,549 shares in the aggregate) for all of the outstanding shares of the Purchaser. We have further been advised that it is the Purchaser's intention to return Concord to private ownership by the Weinstein family. Accordingly, as soon as practicable after this offer has expired, regardless of whether any shares are tendered to the Purchaser, the Purchaser intends to cause a merger (the "Merger") of the Purchaser into Concord (or of Concord into the Purchaser) upon terms under which the shareholders of the Purchaser will receive stock in the surviving corporation and the shareholders of Concord (other than the Purchaser) will receive cash in the same amount for each share of Concord's Common Stock then held by them as they will receive if they tender now to the Purchaser. Since the Purchaser presently owns more than the required percentage of Concord's Common Stock to cause consummation of the proposed Merger under New York law, shareholders who do not now tender their shares will be unable to prevent the Merger, which Purchaser expects will be consummated on or about April 1, 1975.

In connection with the proposed Merger described in the preceding paragraph, you have requested our opinion as independent investment bankers with respect to the cash price per share which would be fair and equitable to Concord's public shareholders. Shearson Hayden Stone is one of the largest investment banking and securities brokerage firms in the United States. We maintain more than 90 offices in the United States. Canada and Europe. Our services, in addition to securities brokerage on the New York and American Stock Exchanges, include, among others, the underwriting and sale of equity and debt securities to the public, the private sale of equity and debt securities, block trading, the initiation and negotiation of mergers and acquisitions, financial consulting, venture capital financing, investment advisory services and trading in over-the-counter securities. Accordingly, we are accustomed to valuing transactions of virtually all types and advising corporate officers and directors with respect to appropriate terms in connection with various forms of business consolidations, divestitures and liquidations.

In connection with this assignment we have analyzed and compared the financial statements of Concord and certain other publicly owned companies in the textile industry deemed by us to be relevant to such analysis. We have also analyzed pertinent stock market data with respect to Concord and such other companies, including historical price ranges, trading volumes and price earnings ratios. We have also reviewed the terms and circumstances of a number of recent cash tender offers undertaken by publicly owned companies and have taken into consideration such other factors as we believe to be relevant to this transaction.

As sources of information we have utilized annual and interim reports to shareholders and reports filed with the Securities and Exchange Commission. We have also utilized recognized sources of statistical, financial and stock market data such as Moody's Investor Service, Inc. and Standard & Poors Corporation. We have not been furnished with non-public information relating to Concord (or any of its competitors). To the best of our knowledge, the information and data on which we have based our opinion are reliable, but we have not attempted to make any independent verification of such information or data and assume no responsibility for its accuracy.

Based upon our review and analysis as set forth above, it is our opinion that a price per share of \$3.00 is fair and equitable with respect to public shareholders. We express no legal opinion with respect to the appropriateness of the Offer or the proposed Merger in view of the identity of the Purchaser and the nature of the transaction; and our opinion does not reflect any consideration of factors which might arise therefrom.

This letter of opinion is submitted to the Board of Directors of Concord for its information and guidance. If this opinion is to be presented or referred to in whole or in part in any material submitted to shareholders or the Securities and Exchange Commission, we reserve the right to approve the form of presentation.

We appreciate the opportunity to undertake this assignment and are prepared to discuss in further detail any aspect of our opinion.

Very truly yours,

SHEARSON HAYDEN STONE INC.

By Charles M. Edwards, III Charles M. Edwards, III Senior Vice President

CME:sr

#### EXHIBIT C

- § 910. Right of shareholder to receive payment for shares upon merger, consolidation or sale, lease, exchange or other disposition of assets.—(a) A shareholder of a domestic corporation shall, subject to and by complying with section 623 (Procedure to enforce shareholder's right to receive payment for shares), have the right to receive payment of the fair value of his shares and the other rights and benefits provided by such section, in the following cases:
  - (1) Any shareholder entitled to vote who does not assent to the taking of an action specified in subparagraphs (A) and (B).
    - (A) Any plan of merger or consolidation to which the corporation is a party; except that the right to receive payment of the fair value of his shares shall not be available:
      - (i) To a shareholder of the surviving corporation in a merger authorized by section 905 (Merger of subsidiary corporation), or paragraph (c) of section 907 (Merger or consolidation of domestic and foreign corporations); and
      - (ii) To a shareholder of the surviving corporation in a merger authorized by this article, other than a merger specified in subparagraph (i), unless such merger effects one or more of the changes specified in subparagraph (b)(6) of section 806 (Provisions as to certain proceedings) in the rights of the shares held by such shareholder.
    - (B) Any sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation which requires shareholder approval under section 909 (Sale, lease, exchange or other disposition of assets) other than a transaction wholly for cash where the 'areholders' approval thereof is conditioned upon the dissolution of the corporation and the abribution of substantially all of its net assets to the shareholders in accordance with their respective interests within one year after the date of such transaction.
  - (2) Any shareholder of the subsidiary corporation in a merger authorized by section 905 or paragraph (c) of section 907, who files with the corporation a written notice of election to dissent as provided in paragraph (c) of section 623.
- § 623. Procedure to enforce shareholder's right to receive payment for shares.—(a) A shareholder intending to enforce his right under a section of this chapter to receive payment for his shares if the proposed corporate action referred to therein is taken shall file with the corporation, before the meeting of shareholders at which the action is submitted to a vote, or at such meeting but before the vote, written objection to the action. The objection shall include a statement that he intends to demand payment for his shares if the action is taken. Such objection is not required from any shareholder to whom the corporation did not give notice of such meeting in accordance with this chapter or where the proposed action is authorized by written consent of shareholders without a meeting.
- (b) Within ten days after the shareholders' authorization date, which term as used in this section means the date on which the shareholders' vote authorizing such action was taken, or the date on which such consent without a meeting was obtained from the requisite shareholders, the corporation shall give written notice of such authorization or consent by registered mail to each shareholder who filed written objection or from whom written objection was not required, excepting any who voted for or consented in writing to the proposed action.
- (c) Within twenty days after the giving of notice to him, any shareholder to whom the corporation was required to give such notice and who elects to dissent shall file with the corporation a written notice of such election, stating his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares. Any shareholder who elects to dissent from a merger under section 905 (Merger of subsidiary corporation) or paragraph (c) of section 907 (Merger or consolidation of domestic and foreign corporations) shall file a written notice of such

# EXHIBIT 4 TO AFFIDAVIT OF SIDNEY J. SILBERMAN - PROXY STATEMENT ISSUED BY CONCORD FABRICS INC.

election to dissent within twenty days after the giving to him of a copy of the plan of merger or an outline of the material features thereof under section 905.

- (d) A shareholder may not dissent as to less than all of the shares, as to which he has a right to dissent held by him of record, that he owns beneficially. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner, as to which such nominee or fiduciary has a right to dissent, held of record by such nominee or fiduciary.
- (e) Upon filing a notice of election to dissent, the shareholder shall cease to have any of the rights of a shareholder except the right to be paid the fair value of his shares and any other rights under this section. A notice of election may be withdrawn by the shareholder at any time before an offer is made by the corporation, as provided in paragraph (g), to pay for his shares. After such offer, withdrawal of a notice of election shall require the written consent of the corporation. If a notice of election is withdrawn, or the proposed corporate action is abandoned or rescinded, or a court shall determine that the shareholder is not entitled to receive payment for his shares, or the shareholder shall otherwise lose his dissenter's rights, he shall not have the right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the filing of his notice of election, including any intervening presuch rights have expired or any such dividend or distribution other than in cash has been completed, in lieu thereof, at the election of the corporation, the fair value thereof in cash as determined by the board as of the time of such expiration or completion, but without prejudice otherwise to any corporate proceedings that may have been taken in the interim.
- (f) At the time of filing the notice of election to dissent or within one month thereafter the share-holder shall submit the certificates representing his shares to the corporation, or to its transfer agent, which shall forthwith note conspicuously thereon that a notice of election has been filed and shall return the certificates to the shareholder or other person who submitted them on his behalf. Any shareholder who fails to submit his certificates for such notation as herein specified shall, at the option of the corporation exercised by written notice to him within forty-five days from the date of filing of such notice direct. Upon transfer of a certificate bearing such notation, each new certificate issued therefor shall bear a similar notation together with the name of the original dissenting holder of the shares and a transferee shall acquire no rights in the corporation except those which the original dissenting shareholder had after filing his notice of election.
- (g) Within seven days after the expiration of the period within which shareholders may file their notices of election to dissent, or within seven days after the proposed corporate action is consummated, whichever is later (but in no case later the ninety days from the shareholders' authorization date), the corporation or, in the case of a merger or consolidation, the surviving or new corporation, shall make a written offer by registered mail to each shareholder who has filed such notice of election to pay for his shares at a specified price which the corporation considers to be their fair value.

If the corporate action has not been consummated upon the expiration of the ninety-day period after the shareholders' authorization date, the offer may be conditioned upon the consummation or such action. Such offer shall be made at the same price per share to all dissenting shareholders of the same class, or if divided into series, of the same series and shall be accompanied by a balance sheet of the corporation whose shares the dissenting shareholder holds as of the latest available date, which shall not be earlier than twelve months before the making of such offer, and a profit and loss statement or statements for not less than a twelve-month period ended on the date of such balance sheet or, if the corporation was not in existence throughout such twelve-month period, for the portion thereof during which it was in existence. If within thirty days after the making of such offer, the corporation making the offer and any shareholder agree upon the price to be paid for his shares, payment therefor shall be made within sixty days after the making of such offer or the consummation of the proposed corporate action, whichever is later, upon the surrender of the certificates representing such shares.

# EXHIBIT 4 TO AFFIDAVIT OF SIDNEY J. SILBERMAN - PROXY STATEMENT ISSUED BY CONCORD FABRICS INC.

- (h) The following procedure shall apply if the corporation fails to make such offer within such period of seven days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares:
  - (1) The corporation shall, within twenty days after the expiration of whichever is applicable of the two periods last mentioned, institute a special proceeding in the supreme court in the judicial district in which the office of the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares. If, in the case of merger or consolidation, the surviving or new corporation is a foreign corporation without an office in this state, such proceeding shall be brought in the county where the office of the domestic corporation, whose shares are to be valued, was located.
  - (2) If the corporation fails to institute such proceeding within such period of twenty days, any dissenting shareholder may institute such proceeding for the same purpose not later than thirty days after the expiration of such twenty day period. If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct.
  - (3) All dissenting shareholders, excepting those who, as provided in paragraph (g), have agreed with the corporation upon the price to be paid for their shares, shall be made parties to such proceeding, which shall have the effect of an action quasi in rem against their shares. The corporation shall serve a copy of the petition in such proceeding upon each dissenting shareholder who is a resident of this state in the manner provided by law for the service of a summons, and upon each nonresident dissenting shareholder either by registered mail and publication, or in such other manner as is permitted by law. The jurisdiction of the court shall be plenary and exclusive.
  - (4) The court shall determine whether each dissenting shareholder, as to whom the corporation requests the court to make such determination, is entitled to receive payment for his shares. If the corporation does not request any such determination or if the court finds that any dissenting shareholder is so entitled, it shall proceed to fix the value of the shares, which, for the purposes of this section, shall be the fair value as of the close of business on the day prior to the shareholders' authorization date, excluding any appreciation or depreciation directly or indirectly induced by such corporate action or its proposal. The court may, if it so elects, appoint an appraiser to receive evidence and recommend a decision on the question of fair value. Such appraiser shall have the power, authority and duties specified in the order appointing him, or any amendment thereof.
  - (5) The final order in the proceeding shall be entered against the corporation in favor of each dissenting shareholder who is a party to the proceeding and is entitled thereto for the value of his es so determined.
  - (6) The final order shall include an allowance for interest at such rate as the court finds to be equitable, from the shareholders' authorization date to the date of payment. If the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious or otherwise not in good faith, no interest shall be allowed to him.
  - (7) The costs and expenses of such proceeding shall be determined by the court and shall be assessed against the corporation, except that all or any part of such costs and expenses may be apportioned and assessed, as the court may determine, against any or all of the dissenting shareholders who are parties to the proceeding if the court finds that their refusal to accept the corporate offer was arbitrary, vexatious or otherwise not in good faith. Such expenses shall include reasonable compensation for and the reasonable expenses of the appraiser, but shall exclude the fees and expenses of counsel for and experts employed by any party unless the court, in its discretion, awards such fees and expenses. In exercising such discretion, the court shall consider any of the following: (A) that the fair value of the shares as determined materially exceeds the amount which the

# EXHIBIT 4 TO AFFIDAVIT OF SIDNEY J. SILBERMAN - PROXY STATEMENT ISSUED BY CONCORD FABRICS INC.

corporation offered to pay; (B) that no offer was made by the corporation; and (C) that the corporation failed to institute the special proceeding within the period specified therefor.

- (8) Within sixty days after final determination of the proceeding, the corporation shall pay to each dissenting shareholder the amount found to be due him, upon surrender of the certificates representing his shares.
- (i) Shares acquired by the corporation upon the payment of the agreed value therefor or of the amount due under the final order, as provided in this section shall become treasury shares or be cancelled as provided in section 515 (Reacquired shares), except that, in the case of a mergor or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide.
- (j) No payment shall be made to a dissenting shareholder under this section at a time when the corporation is insolvent or when such payment would make it insolvent. In such event, the dissenting shareholder shall, at his option:
  - (1) Withdraw his notice of election, which shall in such event be deemed withdrawn with the written consent of the corporation; or
  - (2) Retain his status as a claimant against the corporation and, if it is liquidated, be subordinated to the rights of creditors of the corporation, but have rights superior to the non-dissenting shareholders, and if it is not liquidated, retain his right to be paid for his shares, which right the corporation shall be obliged to satisfy when the restrictions of this paragraph do not apply.
  - (3) The dissenting shareholder shall exercise such option under subparagraph (1) or (2) by writte: notice filed with the corporation within thirty days after the corporation has given him written notice that payment for his shares cannot be made because of the restrictions of this paragraph. If the dissenting shareholder fails to exercise such option as provided, the corporation shall exercise the option by written notice given to him within twenty days after the expiration of such period of thirty days.
- (k) The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (e), and except that this section shall not exclude the right or such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.
- (1) Except as otherwise expressly provided in this section, any notice to be given by a corporation to a shareholder under this section shall be given in the manner provided in section 605 (Notice of meetings of shareholders).
- (m) This section shall not apply to foreign corporations except as provided in subparagraph (e)(2) of section 907 (Merger or consolidation of domestic and foreign corporations).

AFFIDAVIT OF MARTIN WOLFSON IN OPPOSITION TO MOTION FOR FRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ARNOLD MARSHEL,

Plaintiff,

: 75 CIV 1018 HRT

- against - : AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

AFW FABRIC CORP., et al., :

Defendants. :

\_\_\_\_X

STATE OF NEW YORK )

SS.: COUNTY OF NEW YORK )

MARTIN WOLFSON, being duly sworn, deposes and says:

- 1. I am a director, and the Secretary and Treasurer, of defendant Concord Fabrics Inc. ("Concord"). I have been its chief financial officer since March 1973, and prior to that was Assistant Treasurer since April 1969. I submit this affidavit in opposition to plaintiff's motion for a preliminary injunction against the merger of AFW Fabric Corp. into Concord.
- 2. Paragraph 13 of the amended complaint alleges - upon information and belief - that Compord's "prosperity" has been greater than its reported figures reflect because defendants Alvin and Frank Weinstein caused Concord to issue financial information "in which earnings have been improperly depressed or deferred by the introduction of substantial and improper inventory mark-downs and by unwarranted reserves and by the utili-

zation of other improper accounting practices". This
vague, unsur orted charge - which is not contained in
the moving affidavit of plaintiff's counsel - is entirely
baseless.

3. I have personal knowledge of the process of taking and valuing inventory for purposes of the financial statements of Concord since at least April 1969, and I state categorically that during this entire period there have been no "improper inventory mark-downs". At the end of each accounting period inventories are valued at the lower of cost and market. Inventory mark-downs are regular occurrences in our fashion industry, due to fluctuating market prices of raw materials (greige goods) and to the obsolescence of finished goods styled for a particular season but not sold for that season. In each instance where a market valuation lower than cost is used it reflects management's best judgment at the time, based upon the relevant factors such as replacement cost of raw materials (greige goods) or the selling price of comparable finished goods. This judgment is made as a result of consultation among Alvin Weinstein, Chairman of the Board, and David Caplan, President, who are familiar with woven goods, Earl Kramer, President of the Knit Division, and myself and the Assistant Treasurer. At fiscal year-end our valuations are then reviewed by Eisner & Lubin, Concord's certified public accountants.

Furthermore, it should be obvious that while the effect of excessive inventory mark-downs taken at the end of any fiscal year would be to understate the income of that year, a sale of such inventory in the next iscal year would overstate the profit in that year, and that if the inventory is not sold in the following fiscal year

it would indicate that the mark-down was certainly justified.

- 4. I also state categorically that during the period referred to above there have been no "unwarranted reserves" and no "improper accounting practices". In recent years we have had only three types of reserves:
- (a) depreciation reserves, computed in accordance with settled guidelines and fully disclosed in the financial statements;
- (b) a reserve for doubtful accounts, the amount of which is determined by our financial officers in consultation with our credit department, based upon a review of our receivables, the financial condition of the account debtors and the state of their business, and the general economic climate. This determination is reviewed at year-end by Eisner & Lubin, and the amount of the reserve is disclosed in the financial statements. The reserve for doubtful accounts has been lower in recent years than in preceding years; the following table shows the amount of the reserve at the end of the last six fiscal years:

<u>1969</u> <u>1970</u> <u>1971</u> <u>1972</u> <u>1973</u> <u>1974</u> \$505,000 \$502,000 \$403,000\* \$325,000 \$282,000 \$485,000

\*restated to exclude amounts attributable to a former subsidiary.

These reserves, which are disclosed in Concord's annual reports, have certainly not been "unwarranted";

- (c) the provision for losses in connection with the closing of the warehouse, which is fully disclosed in the financial statements and Annual Reports and which, unfortunately, far from being "unwarranted", has had to be augmented because the warehouse has not yet been rented to another tenant.
- 5. I categorically deny the allegation contained in paragraph 24 of the amended complaint - but not contained in the moving affidavit - that the Weinsteins caused Concord "to issue financial statements in which present earnings were improperly understated or deferred".
- I have read the affidavit of Sidney J. Silberman in opposition to the motion. In particular I have reviewed the information and data contained in ¶¶ 14 and 16-20, and I confirm the accuracy thereof.

Martin Yolf son

Sworn to before me this

21st day of March, 1975.

ROSALIND ARONOWITZ
Rotary Public, State of New York
No. 24 0099400
Qualified in Kings County
Certificate Filed in New York County
Term Expires March 30, 1977

AFFIDAVIT OF DAVID R. CAPLAN IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION\*

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ARNOLD MARSHEL,

Plaintiff,

- against -

AFFIDAVIT IN OPPOSITION

AFW FABRIC CORP., et al.,

Defendants. :

TO MOTION FOR PRELIMINARY

INJUNCTION

STATE OF NEW YORK )

says:

ss.:

COUNTY OF NEW YORK )

DAVID R. CAPLAN, being duly sworn, deposes and

- 1. I am, and since September 1971 have been, the president and a director of defendant Concord Fabrics Inc. ("Concord"). I submit this affidavit in opposition to plaintiff's motion for a preliminary injunction against the merger of AFW Fabric Corp. into Concord.
- 2. I have read the vague charge contained in paragraph 13 of the amended complaint, that Concord's earnings have been improperly depressed or deferred by the use of "substantial and improper inventory mark-downs". I have participated in the valuation of inventories in connection with the preparation of Concord's financial statements ever since I joined the company, and during this period there have been no "improper inventory mark-downs".

AFFIDAVIT OF DAVID R. CAPLAN IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Inventories are valued at the lower of cost and market, and the determination of the market value of inventories, where such value is less than cost, is made by a process of consultation among Alvin Weinstein, Chairman of the Board, and myself, who are most familiar with woven goods, Earl Kramer (or his predecessor) as the head of the Knit Division, and our principal financial officers including Martin Wolfson who is now Treasurer. This determination reflects the best judgment of these people at the time. The inventory valuations at year-end are then reviewed by Eisner & Lubin, Concord's certified public accountants.

Sworn to before me this

19th day of March 1975

ROCALIND ADDROVATZ
Notary Public, Stole of New York
No. 24-0059400
Ouelified in Kings County

Qualified in Kings County

Certificate Filed in New York County

Term Expires March 30, 1977

# REPLY AFFIDAVIT OF MARTIN A. COLEMAN IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	
ARNOLD MARSHEL,	
Plaintiff,	- 1
-against- 75 Civ.	1018: LFM
AFW FABRIC CORP., CONCORD FABRICS, INC., ALVIN WEINSTEIN and FRANK WEINSTEIN,	
Defendants.	. 1
GUY MICHAELS,	
Plaintiff,	
-against- 75 Civ.	1027
ALVIN WEINSTEIN, FRANK WEINSTEIN, AFW FABRIC CORPORATION, CONCORD FABRICS, INC., and SHEARSON HAYDEN STONE, INC.,	
Defendants.	
BARRY L. SWIFT,	
Plaintiff,	
-against- 75 Civ	. 1465
CONCORD FABRICS, INC., AFW FABRIC CORP., ALVIN WEINSTEIN and FRANK WEINSTEIN, PLAINT: REPLY AFF	
Defendants.	
STATE OF NEW YORK ) ) ss.:	
MARTIN A. COLEMAN, being duly sworn, deposes an	d says:
I am a member of the firm of Rubin Baum Lev	in Constan
& Friedman, attorneys for the plaintiff in the Marshel ac	ction. I
respectfully submit this reply affidavit for the sole pur	pose of

placing before the Court certain documents which were obtained by me from defendants in connection with document discovery in the Marshel action.

- 2. Annexed hereto as Exhibit 1 is a copy of the first three pages of the preliminary proxy material filed by Concord Fabrics, Inc. with the Securities and Exchange Commission in connection with its contemplated freeze-out merger. Annexed hereto as Exhibit 2 is a copy of the Letter of Comment issued by the Securities and Exchange Commission under date of March 11, 1975.
- 3. The Court's attention is respectfully directed to page 3 of the preliminary proxy material and specifically to the last sentence of the section entitled "Purpose And Background Of Proposed Merger." It is stated therein that "...the Weinstein family will gain the opportunity to operate the Company's business without the expense or other possible disadvantages of a public corporation."
- 4. At page 2 of the Securities and Exchange Commission's Letter of Comment, the Commission requested that Concord "indicate the amount of the approximate expenses each year due to being a public company and enumerate 'other possible disadvantages of being a public company' if such discussion is retained."
- change Commission, Concord determined to delete from its final proxy statement any references to Concord's expenses of remaining a public corporation or to any other possible disadvantages to Concord thereby. Accordingly, defendants' concession herein that there

#### REPLY AFFIDAVIT OF MARTIN A. COLEMAN IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

are no business purposes for Concord to go private is entirely consistent with the facts. Concord was obviously unable to explain how it would be advantaged by an expenditure of more than \$1,600,000. Indeed, the interest alone on such a sum far exceeds whatever costs are connected with remaining a public company.

MARTIN A. COLEMAN

Sworn to before me this

2d day of April, 1975.

ETELN N. ROSENETEG Schary Fubits, State of New York No. 31-8649555 Qualified in New York County Commission Expires March 30, 1976

#### CONCORD FABRICS INC.

#### PROXY STATEMENT

A special meeting of shareholders of Concord Fabrics Inc. (the "Company") is to be held on April 3, 1975 for the purpose of voting on a proposal to approve and adopt a Plan of Merger of AFW Fabric Corp. ("AFW") into the Company; a copy of the Plan of Merger is attached as Exhibit A to this Proxy Statement. The merger will result in the Company becoming a privately-held concern owned entirely by Alvin Weinstein, Frank Weinstein and certain Weinstein family trusts. This will be accomplished by (a) each shareholder of the Company (other than AFW) receiving \$3 a share in cash, and (b) the shareholders of AFW (i.e., the Weinstein family and the trusts) receiving 1,226,549 shares of the Company's Common Stock, which will represent all of the Company's then outstanding stock.

The accompanying form of proxy for use at the meeting and at any and all adjournments thereof is solicited by management and may be revoked, at any time prior to its exercise, by written notification to the Secretary of the Company. Proxies in the accompanying form which are properly executed by shareholders and duly returned to management and not revoked will be voted in accordance with the specification thereon, and in the absence of such specification, in favor of the proposed merger described below. Management knows of no business to be presented for consideration at the meeting other than as stated in the notice of meeting. It is intended, however, that the persons named in the management proxies may vote in accordance with their judgment on any other proposal properly presented for action.

The Company will pay the cost of soliciting proxies in the accompanying form. The address of the principal executive office of the Company is 1411 Broadway, New York, New York 10018 and its telephone number is 212-594-2300. It is contemplated that this Proxy Statement, together with the accompanying form of proxy, will be mailed to shareholders on or about March 11, 1975.

#### INTRODUCTORY STATEMENT AND SPECIAL FACTORS

In considering the proposed merger, shareholders should consider the following:

### 1. Ownership of AFIV; Tender Offer.

AFW was organized in January 1975 for the purpose of making a tender offer for the Company's shares and thereafter causing a merger of AFW and the Company. On February 5, 1975 AFW acquired from Alvin Weinstein, Frank Weinstein, and seven trusts of which Frank Weinstein is trustee or a co-trustee, an aggregate of 1,226,549 shares, representing approximately 68% of the Company's outstanding Common Stock. This stock was acquired solely in exchange for shares of A'W's stock, all of which is owned by the Messrs. Weinstein and the trusts. On February 6, 1975 AFW made a tender offer to purchase the Company's outstanding shares of Common Stock at a price of \$3 per share. The tender offer expired ou March 5, 1975 and an aggregate of ..... shares was tendered. Accordingly, as of the date of this Proxy Statement, AFW owned ..... shares, representing approximately ...% of the Company's outstanding Common Stock. Alvin Weinstein is Chairman of the Board and chief executive officer of the Company, and Frank Weinstein is Chairman of the Executive Committee of the Company. See "Purpose and Background of Proposed Merger." [p. 3]

### 2. Inability to Defeat Approval of Merger.

AFW owns more than the percentage of the Company's Common Stock required to approve the merger and intends to vote such stock in favor of the merger. Accordingly, the other shareholders of the Company will be unable to defeat approval of the merger by voting against

MARTIN A. COLEMAN -XY MATERIAL

it and thus may either accept & "Voting Rights and Vote Require Rights of Dissenting Shareholds

#### 3. AFIV's Controlling Interest in

As a result of its ownershiptender offer (...% as of the decontrol the policies and manager are the only executive officers the three principal executive offithe terms and other aspects occuducted at arm's length. The of the other six directors are exampled of the appropriate finantials firm which rendered as "Action of Board of Directors" January, 1975.

#### 4. Prior Public Offerings.

An initial public offering 1968 at a price of \$15 per sha June, 1969 Alvin and Frank W share, realizing net proceeds of

#### 5. Source of Funds.

The net effect of the merge Stock under the tender offer a merger will have come from the

#### 6. Summary of Notice Require

A shareholder who desires fair value of his shares as det with the Company before the v by New York law, a written ob demand payment for his share will constitute a waiver of a shar without filing the requisite writ senting Shareholders" [p. 5].

#### 7. Per Share Data.

The following table gives the indicated and its net book value [p. 6].

Earnings or (lo-							
operations							
Net earnings or (	los	1)			• ~		
Net book value							

<sup>\*</sup> See Note I to "Per Share

re in cash or exercise their appraisal rights. See 3], "Terms of the Proposed Merger" [p. 4] and

of the Common Stock of the Company prior to the Proxy Statement), AFW had and has the power to Company. In addition, Alvin and Frank Weinstein ogether own 99% of AFW's stock, and are two of Company. Accordingly, the negotiations concerning fosed merger cannot be considered to have been Weinstein are directors of the Company, and four f the Company; another director is the father of a sent of Shearson Hayden Stone Inc., the investment concerning the value of the Company's shares (see I the remaining director was elected to the Board in

Stock was made entirely by the Company in July, adjustment for a subsequent stock dividend). In publicly 100,000 shares each, at a price of \$20 per 50,000 each.

all of the funds both for the purchase of Common ent to stockholders pursuant to the terms of the "Source of Funds" [p. 4].

#### Appraisal Rights.

appraisal rights and to receive payment for the dicial appraisal proceeding is required to file ders, as the first step in the procedure specified merger, including a statement that he intends to er is effected. A vote for adoption of the merger praisal rights, and a mere vote against the proposal n is not considered sufficient. See "Rights of Dis-

y's net earnings on a per share basis for the periods at the end of such periods. See "Per Share Data"

For th								
Weeks Ended				For the 13 Weeks Ended				
Apg. 29, 1971*	Sept. 3, 1972	Sept. 2, 1973	Sept. 1. 1974	Dec. 2, 1973	Dec. 1, 1974			
	(53 Weeks)	(52 Weeks)	(52 Weeks)	(Un- audited)	(Un- andited)			
(\$ .15)	(\$ .76)	\$ .13	\$ .29	\$ .23	\$ .01			
(\$ .10)	(\$ .71)	\$ .13	\$ .29	\$ .23	\$ .01			
\$7.91	\$7.20	\$7.52	\$7.61	\$7.55	\$7.62			
	•							

6].

#### VOTING RIGHTS AND VOTE REQUIRED

Under the Business Corporation Law of the State of New York the affirmative vote of at least two-thirds of the outstanding shares of Common Stock of the Company is required for approval of the merger. AFW owns more than the number of shares of the Company's Common Stock required for approval of the merger and intends to vote its shares in favor of the merger. Accordingly, other share-holders of the Company will be unable to defeat approval of the merger by voting against it.

#### PURPOSE AND BACKGROUND OF PROPOSED MERGER

The purpose of the proposed merger of AFW and the Company is to return the Company to the status of a privately-held corporation owned by the Weinstein family.

AFW, a New York corporation, was organized in January, 1975 for the purpose of making the tender offer and thereafter causing a merger of AFW and the Company. In February, 1975 AFW acquired all of the shares of the Company's Common Stock owned by the Messr Weinstein and seven trusts of which Frank Weinstein is trustee or co-trustee (in contrast the is also be income beneficiary and in the other trusts the children of Alvin Weinstein have remainder interests) solely in exchange for shares of AFW's Common Stock. As a result of this exchange, AFW owned 1,226,549 shares of the Company's Common Stock, representing approximately 68% of the outstanding shares.

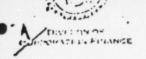
On February 6, 1975 AFW made a tender offer to purchase the Company's outstanding shares of Common Stock at a price of \$3 per share. The tender offer expired on March 5, 1975 and an aggregate of ....... shares was tendered. Accordingly, as of the date of this proxy statement, AFW owned ...... shares, representing approximately ....% of the Company's Common Stock.

In recent years the Company's stock has not been actively traded. For example there were no sales of stock on the American Stock Exchange on 113 of the 277 trading days from January 2, 1974 through February 4, 1975 (the last trading day prior to the announcement of the tender offer and proposed merger), and the average trading volume on the days when the shares did trade was 503 shares.

The Company thus does not afford its shareholders the advantage of an active trading market—and therefore liquidity—for their shares. As a result of the merger it will be offering all its public shareholders a cash pice for all of their shares which the Company believes to be not less than their fair value and which is substantially higher than the market price prevailing before announcement of the tender offer on February 6, 1975. At the same time the Weinstein family will gain the opportunity to operate the Company's business without the expense or other possible disadvantages of a public corporation.

#### ACTION OF BOARD OF DIRECTORS

On February 5, 1.75, the Board of Directors of the Company voted to approve the merger with AFW. The Board of Directors believes that the price of \$3 per share to be paid to public shareholders upon the merger is fair. In reaching that conclusion the Board considered the price of, and activity in, the Company's stock, the financial position, earnings and prospects of the Company, the volatile nature of the fabric industry, and other factors, and the opinion of Shearson Hayden Stone Inc., an investment banking and securities brokerage firm ("Shearson").



6222 . : 1975

EXHIBIT 2 TO REPLY
AFFIDAVIT OF MARTIN
A. COLEMAN - LETTER
OF COMMENT ISSUED
BY SECURITIES AND
EXCHANGE COMMISSION

Mr. Sidney J. Silberman Raye, Scholer, Fierman, Rays & Mondler 425 Park Avenue New York, Mass York 10022

Ma. Concord ? Notes Inc. File No. 1-3060

Dear Mr. Silberman:

We have the following comments on the preliminary proxy material of the above company filed February 12, 1975 for its annual stockholders' meeting to be held April 3, 1975.

#### PROXY STATEMENT

#### Introductory Statement - Pages 1-2

A new first paragraph should be added stating the purpose of the merger and the effect of its consummation, pointing out, for example, that the Weinsteins will be able to determine all policies of the Company, such as salaries, dividends, and business activities, without public scrutiny and solely for their own benefit.

#### AFN's Controlling Interest - Page 2

Indicate that the newly elected director was a nominee of management.

### Rider 1 and Rider X - Page 1 and Page 5

The names of the suits referred to should be provided. Also, state the basis of the suits referred to in such riders.

State whether or not the tendered shares have been returned.

#### Purposes and Background - Page 3

If the Weinsteins have any contractual arrangements with the Company or plan to enter any such arrangements after the merger, please disclose this.

im. Sidney J. Silbermon Page 2

It would seem that so long as the Company's shares remain listed on the AMAM, a certain liquidity is necessarily protect. Thus, the size secretae of the fifth paragraph should be expended to emplain accurately the nature of the liquidity of a stock listed on such exchange of delet. We implications that listed stocks do not have liquidity.

Disclose whether or not the Company's stock will be delisted If this met. Is not consummated, especially in light of the large that the tender offer has been concelled.

• In the fitch paragraph harounder, indicate the amount of the approximate expenses each year due to being a public company and enumerate "other possible disadvantages of being a public company" if such discussion is retained. Reference should also be made to the advantages to shareholders of a public corporation.

Since the Company cites disadvantages of being a public corporation, indicate why these disadvantages were not present in 1968 and 1969 and whether the Company has therefore decided to for go public financing in the future.

#### Action of Doard of Directors - Pages 3-4

This section should show clearly the reasons why the approval by Concord's Board may not be considered to be an action taken by an uninterested body.

It is noted that the board of directors in arriving at its conclusion that the proposed merger is fair gave consideration to the company's financial position. In this connection, it should be stated whether the board specifically considered the company's working capital position of over \$9.00 per share as well as its book value of approximately \$ per share. It is also requested that Shearson Hayden Stone also indicate whether they considered such factors in rendering their opinion.

Consideration should be given to disclosing the fact that there have been court decisions relating to "going private". In this connection, an opinion of counsel should be provided regarding the legality of this transaction under New York law. Such opinion should cover the extent to which New York law requires that the Company have a valid business purpose for the transaction.

Mr. Sidney J. Silberman Page 3

The forepart of the proxy statement should contain a paragraph under an appropriate caption summarizing the effect of the transaction on the Walnatain family. In this connection, data should be presented in tabular form showing that without any additional investment on the part of the deinstein family, their interest in the equity of the company will go from approximately \$ (60% of the quity at December 1, 1974) to \$ (100% of the pro forms equity). Similarly, it should disclose that their interest in the company's earnings for the year ended September 1, 1974 will increase from \$ (65% of the earnings) to \$ (100% of the pro forms earnings).

#### Litigation - Page 5

If so stated in the complaint, this paragraph should be more specific as to why it is claimed the merger is not valid under New York law, violates due process, and violates the anti-fraud provisions.

It is assumed that appropriate disclosure will be made of the suit filed in Federal court on March 6, 1975.

The actual or proposed response of the Company to the suits should be noted.

The opinion of counsel to be furnished should make specific reference to these suits.

Such opinion should also consider the requirements of the Federal securities laws, such as Rule 10b-5 under the Securities Exchange Act of 1934.

#### Pro forma per share data - Page 7

A footnote, referenced to the pro forma net earnings per share, should be added explaining whether any pro forma adjustments were made and, if so, the details of such adjustments.

#### Management's Analysis - Page 12

Another section should be added analyzing the results for fiscal 1973. See Guide 1(c)(3) under the Securities Exchange Act of 1934.

Also, consideration should be given to explaining the large loss in fiscal year 1972.

Sidney J. Silberman

# Aggreent's Analysis - Fiscal 1974 - Page 12

A discussion of the anterial changes in the items "Selling and oplay expenses" and "Income tax provision" should also be given.

# ingrament's Amalysis - 13 Mee'ts Ended December 1, 1974 - Pary 12

The analysis should include reasons for the doubling of rovision the doubtful accounts.

## Pagement's Estimated Commarison - Page 12

This section should be updated to include actual figures for period ended March 2, 1975 or to as recent a date as possible.

In the seventh line, the word "period" should be retained as

### vidends - Page 12

The first paragraph should be revised so that the figures stain to fiscal years rather than calendar years.

The amount available for dividends under the Note Agreement ould also be given as a per sham figure, both before and after the rger.

Any plans to declare dividend; after the merger should be disclosed; negative statement would be appropriate, if applicable.

## rice Range - Pages 12-13

Please indicate in the table or the note to it the status of rading in the Company's stock on February 5, 1975.

## he Business of the Company - Pages 13-15

The names of all officers and directors should be given, as all as their positions with the Company or other positions.

### 11es - Pages 17-14

The dependency on any single customer or small group of customers for a significant amount of onles should be disclosed.

Mr. Sidney J. Silberman Page 5

# Cincollition of Stock Options - Page 15

Please state that Messra. Caplan and Kramer are directors and wifice. Tof the Company as well-as indicating the amount or qualified option, helt by other director; or officers.

# Transactions - Page 15

Similar information should be provided for the past two years, in addition to the for the past sixty days.

# Solicitation - Page 16

A reasonably itemized list of all expenses to be incurred by the Company in the merger and incurred in the tender should be included.

# American Stock Exchange Listing Status - Page 16

· the transfer with the property to the second

a removement comments as palar, the set in Equal of

The content of this paragraph should be placed with the last paragraph under "Purpose" on page 3 or elsewhere in the front part of the proxy statement.

# Financial Statements

The Registrant is requested to include in the proxy material pro forma data showing the effect of the proposed transactions on the balance sheet as of the latest practical date.

If this information can be conveyed by appropriate revisions to the Capitalization table (on page 8) this would be an acceptable alternative. Dollar amounts of all components of stockholders equity should be presented in the Capitalization table in that event.

The dollar amount of the quity of the Weinstein group in Concord's historical earnings for the latest year and interim period based on their present percentage of holding should be contrasted with the dollar amount of their interest in pro forms earnings computed as though the proposed transaction had occurred as of September 3, 1973 (the beginning of the inst-fiscal year) \_\_\_\_. - min - friend on a free one the live of the

the year of the property customer or and it because of costs

Mr. Sidney J. Silberman Page 6

#### CENTERAL

Your attention is directed to the Commission's release (Securities Act No. 3357) relating to "going private".

Please file revised preliminary proxy material in accordance with Rule 14a-5.

The furnishing of comments by the staff of the Commission does not constitute a determination by the staff or the Commission of the fairness of the transaction.

ritable of black name -- project

Any questions with respect to the foregoing should be directed to Thomas Klee at 202 755-1364 or Joseph Hock & 202 755-1401 with respect to the financial statements.

Sincerely,

Principle H. Cetter

Franch Chief

OPINION OF HONORABLE LLOYD F. MacMAHON DATED JUNE 24, 1975

Cencord Fabrier

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	
	-х
ARNOLD MARSHEL,	: OPTINION
Plaintiff,	· fact or
-against-	: 75 Civ. 1018-LFM
AFW FABRIC CORP. et al.,	:
Defendants.	: -x
GUY MICHAELS,	•
Plaintiff,	:
-against-	: 75 Civ. 1027-LFM
ALVIN WEINSTEIN et al.,	:
Defendants.	: -x
JESSE KRAUSE,	:
Plaintiff,	:
-against-	: 75 Civ. 1064-LFM
CONCORD FABRICS, INC. et al.,	
Defendants.	: -x
BARRY L. SWIFT,	
Plaintiff,	:
-against-	: 75 Civ. 1465-LFM
CONCORD FABRICS, INC.,	
Defendants.	: -x

OPINION OF HONORABLE BLOYD F. MACMAHON DITED JUNE 24, 1975

### APPEARANCES:

Rubin Baum Levin Constant & Friedman, New York City, for plaintiff in 75 Civ. 1018.

Wolf Popper Ross Wolf & Jones, New York City, for plaintiff in 75 Civ. 1027.

Kass, Goodkind, Wechsler & Gersten, New York City, for plaintiff in 75 Civ. 1064.

Lipper, Lowey & Dannenberg and Burton L. Knapp, New York City, for plaintiff in 75 Civ. 1465.

Kaye Scholer Fierman Hays & Handler, New York City, for defendants.

### MacMAHON, District Judge.

Plaintiffs in these four related actions move, pursuant to Rule 65, Fed.R.Civ.P., to enjoin preliminarily the proposed merger between Concord Fabrics, Inc. (Concord) and AFW Fabric Corp. (AFW). Plaintiff Michaels also seeks leave to file an amended complaint. Defendants move for an order consolidating the four actions for all purposes, appointing a general or liaison counsel for plaintiffs, and staying Concord shareholders from commencing any additional actions based on the proposed merger.

These class and derivative accions arise out of the proposed merger of defendants Concord and AFW. Concord, a converter of fabrics, was, until July 1968, a private corporation owned by defendants Alvin and Frank Weinstein and their families. At that time, 300,000 shares of Concord stock were sold publicly for \$15 per share, and in June 1969 the Weinsteins sold 200,000 shares for \$20 per share, also pursuant to a public offering. Since then, Concord stock has been listed on the American Stock Exchange.

Concord's earnings in 1968 and 1969 were over \$2,000,000 per year, a record level, but its earnings declined sharply in the following two years and have been only moderate over since. Concord paid dividends from 1968 through the first quarter of 1970. Since then, no dividends have been paid.

Concord stock was selling at a high of \$25 per share in early 1969 but has steadily declined until it dropped to a low of about \$1 per share in late 1974. This decline is attributable to a discontinuance of the tompany's dividends, declining earnings and general stock market decline. Through March of this year, the price of Concord stock never rose to \$3 per share.

In January of this year, the Weinsteins initiated a plan to return Concord to the private ownership of the Weinstein family. As the first step toward this objective, the Weinsteins organized AFW, and, on February 5, 1975, they transferred 1,226,549 Concord shares, representing 68% of the total outstanding stock to AFW. In exchange for the Concord shares, the Weinsteins received 100% of AFW's stock.

On February 6, 1975, AFW made a tender offer of \$3 per share for the publicly-held Concord stock. The Weinsteins planned to follow this tender offer with the merger of AFW into Concord in April 1975. All store-holders remaining at the time of the merger were to receive \$3 per share for their Concord shares. The net result of the tender offer and merger would be to return Concord to the private ownership of the Weinstein family.

Concord's board of directors arrived at the \$3 per share valuation of Concord's stock following an opinion by the investment banking and brokerage firm of Shearson Hayden Stone, Inc. (Shearson). Shearson advised Concord that \$3 was the fair and equitable value of a Concord share.

n February 28, 1975, the first of these related shareholder actions was filed. Plaintiff, in that purported class and derivative action, charges, in essence, that defendants engaged in a scheme and conspiracy to defraud Concord stockholders into selling their shares at an unfair price, in violation of Sections 10(b), 13(d), 14(a), 14(d) and 14(e) of the Securities Exchange act of 1934, 15 U.S.C. §§ 78j(b), 78(m)(d), 78n(a), 78n(d) and 78(n)(e), various SEC rules and regulations and New York common law. It is alleged that the offering statement issued in connection with the tender offer contained misleading statements and omitted material facts. The derivative claim alleges that defendants defrauded Concord and its shareholders, breached fiduciary duties owed them and wasted corporate assets. Plaintiff seeks, inter alia, to enjoin the tender offer.

The Weinsteins foresaw attempts to enjoin the merger as well as the tender offer, and since the merger alone would accomplish the results they sought, they withdrew the tender offer on March 3, 1975 to avoid unnecessary legal expenses. The Weinsteins' predictions were accurate, for legal proceedings aimed at the merger

were not long in coming. The first of these actions was filed on March 3, 1975, and two others soon followed.

Krause cases are similar. Both of these purported class actions charge violations of Sections 10(b) and 14 of the 1934 Act and common law. Like the Marshel action, their thrust is that defendants are defrauding Concord stockholders into selling their shares at an unfair price. They also allege that the offering statement contained certain misstatements and omissions and seek, inter alia, to enjoin the tender offer and merger. The Michaels action, unlike any of the others, names Shearson as a party defendant.

The last of these four actions, <u>Swift v. Concord Fabrics</u>, <u>Inc.</u>, a putative class and derivative action, grounds jurisdiction on diversity of citizenship and alleges only violations of New York law. It alleges, in essence, that defendants have conspired, in breach of their fiduciary duties, to eliminate Concord's public shareholders by giving them less than adequate value for their shares under the merger of Concord and AFW. The derivative claim charges defendants with wasting Concord's assets and breaching fiduciary duties owed the

corporation and its shareholders. Plaintiff seeks, inter alia, to enjoin the merger.

Plaintiffs move for preliminary injunctions on the ground that the proposed merger will violate Sections 10(b) and 14 of the 1934 Act and New York law. They contend, essentially, that the merger should be enjoined because it serves no legitimate corporate purpose but is intended only to eliminate public shareholders by giving them inadequate compensation for their shares. As such, they claim, the merger is a device, scheme and artifice to defraud, in violation o. Rule 10b-5.

In order for plaintiffs to prevail on their motions for preliminary injunctions, they must demonstrate either a combination of probable success and the possibility of irreparable injury or that they have raised serious questions going to the merits and that the balance of hardships tips sharply in their favor.

Plaintiffs rely on decisions in other circuits holding mergers which eliminate public shareholders without a corporate business purpose violative of Rule 10b-5. The cases in this circuit and in this district, however, are to the contrary.

OPINION OF HONORABLE LLOYD F. MacMAHON DATED JUNE 24, 1975

In <u>Popkin</u> v. <u>Bishop</u>, plaintiff sought to enjoin the merger of a parent corporation and its subsidiaries into a holding company of the parent corporation on the ground that the merger's exchange ratios were unfair. Plaintiff alleged that defendants breached various fiduciary duties and violated Rule 10b-5. The Court of Appeals affirmed the district court's dismissal of the complaint. In reaching its decision, the court assumed that the exchange ratios were actually unfair. It noted, however, that the complaint failed to allege misrepresentation or failure to disclose any material facts about the merger. The court noted that:

"Section 10(b) of the Exchange Act and Rule 10b-5 are designed principally to impose a duty to disclose and inform rather than to become enmeshed in passing judgments on information elicited.

\* \* Underlying questions of the wisdom of such transactions or even their fairness become tangential at best to federal regulation."8

The court concluded that injunctive relief under the federal securities laws does not lie when there has been full disclosure of a merger's terms.

In <u>Dreier v. The Music Makers Group, Inc.</u>,
the court dismissed a Rule 10b-5 claim for legal insufficiency in an action to enjoin a merger closely resembling the merge 2. There, defendants organized a private corporation and transferred to it 60% of the public corporation's stock. The proposed merger was approved by the public corporation's controlling shareholders. Its terms provided for \$3 per share to be paid to the public shareholders. The complaint alleged that the merger's sole purpose was to enrich the controlling shareholders by forcing the minority shareholders to sell at an unfair price. The court held that absent allegations of misrepresentation or nondisclosure, the complaint failed to state a claim under the federal securities laws.

Relying on <u>Popkin v. Bishop</u>, <u>supra</u>, the <u>Dreier</u> court noted that "non-disclosure remains an essential element in any section 10(b)-Rule 10b-5 action. \* \* \*

/T/he treatment of the minority shareholders may well have been grossly unfair but it was completely open.

Under these circumstances plaintiff's remedy is a state court action for appraisal. . . . " The weight of authority, at least in this circuit, supports this interpretation of Rule 10b-5.

plaintiffs' motions here for preliminary injunctions, insofar as they are premised on violations of the federal
securities laws, are without merit. Plaintiffs' claims
that there has been a Rule 10b-5 violation because of the
unfair and inadequate price to be paid for the Concord
shares and the absence of a bona fide corporate purpose
for the merger are patently without merit. Rule 10b-5
simply does not encompass these alleged wrongs.

representations and nondisclosures in connection with the proposed merger, thus lumping their claims within the ambit of Rule 10b-5, we find little factual substance to these allegations. The thrust of plaintiffs' allegations of nondisclosure is that defendants did not disclose the illegality of their actions, i.e., that the merger had no valid business purpose, that the price to be paid for the Concord shares is inadequate, that the Weinsteins are benefitting themselves to the detriment of the public shareholders, and that what is described as a merger is no more than a fraudulent scheme.

The proxy statement, we find, is not misleading. Nor does it fail to disclose any material information. It

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states expressly that AFW was organized for the purpose of causing Concord to be merged with AFW. It discloses that the Weinsteins transferred 68% of Concord's outstanding stock to AFW and, as AFW's sole owners, intend to vote in favor of the merger. The proxy statement further discloses that the public shareholders will be under to defeat the meaning Rather, they must accept \$3 per share or exercise to appraisal rights. The proxy statement includes financial statements and states that the \$3 per share price is based on the opinion of Shearson.

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The proxy statement further states that the purpose of the merger is to return Concord to the private ownership of the Weinsteins so that it may be operated solely in their interests. It also details what effect the merger will have on the financial situation of the Weinsteins.

Although this is far from an exhaustive summary of the information contained in the proxy statement, it demonstrates that the statement lays bear the facts of, and the motives for, the merger. Plaintiffs have failed to demonstrate that the proxy statement misstates material facts or fails to disclose them. All that the statement

appears to omit is plaintiffs' legal conclusion that .

the merger is illegal. We see no indication, at least at this juncture of the litigation, that the conclusion is well founded.

Accordingly, with respect to the federal claims plaintiffs have failed to demonstrate probable success or serious questions going to the merits. Moreover, the man to be suffered by plaintiffs, should the merger be consummated and ultitately adjudicated illegal, will not be irreparable since plaintiffs have a "sufficiently adequate remedy at law" in the way of monetary damages. Plaintiffs have likewise failed to demonstrate that the balance of hardships tips in their favor. Preliminary injunctive relief, therefore, must be denied as to the federal claims.

We find plaintiffs' contention that they are entitled to a preliminary injunction for violations of state law equally without merit. Where a merger is to be accomplished in accordance with statutory proceedings, as here, appraisal is the only remedy available to dissenting shareholders.

"'In short, the merged corporation's shareholder has only one real right; to have the value of his holding protected, and that protection is given him by his right to an appraisal. . He has no right to stay in the picture, to go along into the merger, or to share in its future benefits. . . . .

The remedy of an appraisal and payment for one's shares affords fair and just compensation to dissenting stock-holders while allowing the overwhelming majority to proceed with the merger."14

Plaintiffs have failed to meet the requirements for a preliminary injunction on the state claims. Their motions must therefore be denied.

involve common, if not identical, questions of law and fact, defendants' motion to consolidate the actions is granted to the following extent: all four actions are consolidated for pre-trial purposes; Rubin Baum Levin Constant & Friedman, Esqs., plaintiff's counsel in the Marshel action, are appointed general counsel for plaintiffs in all four cases; general counsel are directed to file a consolidated amended complaint encompassing all parties and all claims in the Marshel, Michaels and Krause cases within twenty (20) days; the Swift case will proceed on its original complaint.

Since the cases now pending are purported class actions, additional shareholder actions based on the same transactions will serve no useful jurpose and will only confuse and delay this already complex litigation. All shareholders of Concord, therefore, shall be stayed from commencing further actions arising out of the transactions challenged by these actions until there has been a determination, pursuant to Rule 23(c), as to whether or not these actions may proceed as class actions.

Accordingly, plaintiffs' motions for preliminary injunctions and for leave to file an amended complaint are denied. Defendants' motion for consolidation, the appointment of general counsel, and a stay of additional actions is granted to the extent set forth above.

So ordered.

Dated: New York, N. Y.

Fine 24, 1975

LLOYD F. MacMAHON

United States District Judge

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Marshel v. AFW Fabric Corp.

Michaels v. Weinstein
Krause v. Concord Fabrics, Inc.

Swift v. Concord Fabrics, Inc.

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75 Civ. 1018-LFM 75 Civ. 1027-LFM 75 Civ. 1064-LFM 75 Civ. 1465-LFM

## FOOTNOTES

Marshel v. AFW Fabric Corp., 75 Civ. 1018.

Michaels v. Weinstein, 75 Civ. 1027.

Krause v. Concord Fabrics, Inc., 75 Civ. 1064 (filed March 4, 1975), and Swift v. Concord Fabrics, Inc. 75 Civ. 1465 (filed March 24, 1975).

While certain plaintiffs also challenge the legality of the tender offer under Section 14 of the 1934 Act, we need not address these contentions since the tender offer has since been withdrawn. This does not preclude damages they may have suffered as a result of the tender der offer at a trial on the merits.

Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973); Gulf & Western Indus, Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973); Robert W. Stark, Jr., Inc. v. New York Stock Exch., Inc., 466 F.2d 743, 744 (2d Cir. 1972); See Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), cert. denied, 394 U.S. 999 (1969).

See Bryan v. Brock & Blevins Co., 343 F. Supp. 1062
(N.D. Ga. 1972), aff'd, 490 F.2d 563 (5th Cir. 1974);

Albright v. Bergendahl, CCH Fed. Sec. L. Rep. 194,997
(D. Utah Sept. 5, 1974). See also United Funds v.

Carter Products, Inc., CCH Fed. Sec. L. Rep. 191,288
(Balt. City Civ. Ct. May 16, 1963).

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- 7 464 F.2d 714 (2d Cir. 1972).
- Popkin v. Bishop, supra, 464 F.2d at 719-20.
- CCH Fed. Sec. L. Rep. ¶94,406 (S.D.N.Y. Feb. 20, 1974).
- Green v. Sante Fe Indus., Inc., 74 Civ. 3915 (S.D. N.Y. Mar. 27, 1975); Tanzer Economic Associates v. Haynie, 388 F. Supp. 365 (S.D.N.Y. 1974); Kaurmann v. Lawrence, 386 F. Supp. 12 (S.D.N.Y. 1974), afr'd per curiam, Docket No. 74-2591 (2d Cir. Apr. 3, 1975). Cf. Broder v. Dane, 384 F. Supp. 1312 (S.D.N.Y. 1974).
- Tanzer Economic Associates v. Haynie, supra, 388 F. Supp. at 369.
- See N.Y. Business Corporation Law §§ 901 et seq. (McKinney 1974 Supp.).
- Willcox v. Stern, 18 N.Y.2d 195 (1966); Beloff v. Consolidated Edison Co., 300 N.Y. 11 (1949).

OPINION OF HONORABLE LLOYD F. MacMAHON DATED JUNE 24, 1975

- 14 Willcox v. Stern, supra, 18 N.Y.2d at 201-02.
- 15 Fields v. Wolfson, 41 F.R.D. 329 (S.D.N.Y. 1967).

DIST/OFFICE NUMBER NUMBER NIMINEL 75 1465 03 24 75 850 1 41 0840 1465 208-1 DEFENDANTS PLAINTIFFS SWIFT, BARRY L. AFW FABRIC CORP. CONCORD FABRICS, INC. WEINSTEIN, ALVIN WEINSTEIN, FRANK

CAUSE

To enjoin proposed merger in violation of fiduciary duties of defendants.

ATTORNEYS

Lipper, Lowey & Dannenberg and Burton L. Knapp 747 Third Avenue New York, N.Y. 10017 tele: 759-1504

NITED STATES DISTRICT COURT DOCKET

Kaye Scholer Fierman Hays & Handler 425 Park Ave. NYC 10022 P1 9-8400

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NR	PROCEEDINGS
(1)	Filed complaint and issued summons.
(2)	Filed pltffs affdvt&notice of motion resorder granting preliminary injunction
(3)	etc.ret. 4/4/75. Filed Pltffs Hemorgadum in support of motion for preliminary
(4)	Filed Order that Douglas S. MacKay is authorized to serve summons&complaint on named defts. Clk(um)
(5)	Filed Affdvt of Service by Douglas S. McKay upon defts of Summons&Complaint, 3/25/75
(8)	Filed deft's affdvt in opposition to pltffs motion for prelim. inj.
(7)	Filed deft's memo of law in opposition to motion for a prelim. inj.  Trans. from Judge TYLER to dudge 1.3 1240.
(8)	Filed Stip. & Order that the for all defts to answer the amended camplt. is ext. from 4-14-75 to the period ending 10 days after the date of filin go the order of Judgo MacMahon granting or denying pltff's pending motion for a prel. inj
(9)	Filed Opinion #42667. Pltffs in these four related cases move to enjoin preliminarily a proposed merger between Concord Fabrics & AFW Fabric orp. Pltff Michaels seeks leave to file an amended complt. Defts move for an order consolidating the four actions for all purposes, appointing a general or liaison counsel for pltffs &
	staying Concord shareholders from commencing additional actions based on proposed merger. For reasons indicated in the opinion, pltffs motions are denied. Defts motion to consolidate the actions is granted & all four actions are consolidated for pre-trial purposes
,	Counsel in the Marshel action are appointed general counsel for pltfin all four cases & they are directed to file a consolidated amended complt encompassing all parties & all claims in the Marshel, Michaels & Krause cases within twenty (20) days. The Swift case wil. proceed on its original complt. All shareholders of Concord are stayed
	pending a determination whether these actions may proceed as class actions pursuant to Rule 23So orderedMAC MAHON, J m/n (Entered in 75 Civ 1018, 75 Civ 1027, & 75 Civ 1064)
(10)	Filed Memo-End. on pltffs motion. Motion denied. See opinion & order of this dateMAC MAHON, J (Opinion above)
)	
PARTY NAME OF TAXABLE PARTY.	

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UNITED STATES DISTRICT COURTS

BARRY L. SWIFT,

Plaintiff,

75 Civil 1465

-against-

AFW FABRIC CORP., CONCORD FABRICS, INC., ALVIN WEINSTEIN and CIASS ACTION (IN PART)

FIGNK WEINSTEIN,

Defendants.

..........

Plaintiff, by his attorneys, Lipper, Lowey & Dannenberg, and Burton L. Krapp, for his amended complaint, complaining of the defendants, respectfully alleges upon information and belief except as to the allegations contained in Paragraph 2 with respect to plaintiff's citizenship, and in Paragraphs 4 through 6 which are alleged upon knowledge, as follows:

#### JURISDICTION AND VENUE

- 1. This Court has jurisdiction of this action under 128 U.S.C. \$1322(a).
- 2. Plaintiff is a citizen and resident of the State of California; the individual defendants are citizens and residents of the State of New York, and the corporate defendants are each New York corporations having their principal offices in the Southern District of New York.
- 3. The amount in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.

- 4. The acts and transactions complained of occurred in substantial part in the Southern District of New York.
- 5. This action is not brought collusively to confer jurisdiction on a court of the United States which it would not otherwise have.

### The Parties

- 6. Plaintiff is, and has been continuously for upwards of six years, the owner and holder of 1,020 shares of common stock of Concord Fabrics, Inc. ("Concord").
- 7. Concord is a New York corporation. Its principal offices are located in the Southern District of New York.
- 8. (a) The individual defendants Alvin Weinstein and Frank Weinstein are brothers and are, respectively, the Chairman of the Board of Directors and the Chairman of the Executive Committee of Concord.
- (b) Each of the individual defendants owns directly or indirectly at least 611,000 shares of the common stock of.

  Concord. Their combined ownership represents, in the aggregate, approximately 68% of Concord's outstanding common stock and constitutes effective control of Concord. Through their executive positions and their stock control of Concord, the individual defendants dominate and control the business and financial policies and affairs of Concord.
- 9. (a) Defendant AFW Fabric Corp. ("AFW") is, and has been since approximately January 1, 1975, a New York corporation.

- (b) AFW was organized for the sole purpose of effectuating the plan of the individual defendants to usurp unto themselves, in violation of their fiduciary duties to Concord and to its minority shareholders, the entire stock ownership of Concord.
- (c) On February 5, 1975, the individual defendants transferred to AFW 1,226,549 shares of common stock of Concord, representing approximately 68% of Concord's outstanding common stock, in exchange for which they received all of the oustanding capital stock of AFW.
  - (d) The individual defendants control AFW.

### The Financial History of Concord

- 10. When Concord became a publicly-held corporation on or about July 11, 1968 it sold to the public, pursuant to a Registration Statement and Prospectus which then became effective, 300,000 shares of common stock at a price of \$15 per share, for a total sales price of \$4,500,000.
- 11. (a) The individual defendants had acquired all of their shares of common stock of Concord for a nominal price prior to the public offering.
- (b) In June, 1969 each of the individual defendants sold to the public 100,000 shares of Concord's common stock at a price of \$20 per share, for a total sales price of \$2,000,000.
- 12. (a) Concord has prospered since the initial sale of its securities to the public in July, 1968.

- (b) Immediately after Concord's sale to the public of 300,000 of its shares in July, 1968 at \$15 per share, the book value of Concord's common stock was \$6.75 per share.
- (c) The disclosed book value of Concord's common stock at February 2, 1975 was \$7.82 per share.
- 13. Concord's prosperity has been even greater than reflected in the foregoing figures, for the individual defendants have caused Concord to issue financial information in which earnings have been improperly depressed or deferred by the introduction of substantial and improper inventory mark-downs and by unwarranted reserves and by the utilization of other improper accounting practices.
  - 14. In the second quarter of the current fiscal year (i.e., December, 1974 through February, 1975), Concord's sales were running at least 25% higher than in the comparable period in the preceding fiscal year and net income is substantially higher.

# Class Action Allegations

- 15. (a) Plaintiff brings the Second Count of this complaint as a class action against all defendants, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, for injuctive relief.
- (b) The Class consists of plaintiff and all common stockholders of Concord similarly situated, who are threatened with the forced sale or who become forced sellers of their common stock

of Concord, under and pursuant to the now-pending purchase offer of AFW and the now-pending merger of AFW and Concord. Excluded from the Class are the individual defendants and members of the immediate family of each of those individual defendants, and any entity in which any of the individual defendants or any member of their immediate family has a beneficial controlling interest.

- (c) The members of the Class are so numerous that joinder of all members in impracticable. Concord has approximately 1,000 common stockholders located throughout the United States.
- (d) There are questions of law and fact involved herein which are common to the Class and which predominate over any questions affecting individual members of the Class. The common questions of law and fact include the questions whether in the conceded absence of any business purpose of the merger of Concord and AFW, the individual defendants have breached their fiduciary duties under the common law and statutory law of the State of New York; whether the price of \$3 per share being foisted on the Class in connection with the proposed merger was determined by the defendants in good faith; whether such price was arbitrarily fixed by them for the primary purpose of taking advantage of temporarily depressed stock market conditions, and to enable the defendants to substantially increase their own equity in the assets and earnings of Concord; whether the proposed merger breaches the defendants' duties of loyalty and good faith owed to minority shareholders to act on all decisions with respect to the assets and affairs of Concord for the benefit of all shareholders and not for their own personal benefit; and the mode of relief to which the class is entitled, including injunctive and other equitable relief.

- (e) Plaintiff will fairly and adequately protect the interest of the Class; he is a member of the Class and his claims are typical of the claims of all class members. Plaintiff does not have interests antagonistic or in conflict with those he represents.
- ate the risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the defendants; and would create the risk of adjudications with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests.
- (g) A class action is superior to other available methods for the fair and efficient adjudication of the claims made therein.
- (h) This Court is the appropriate forum for an adjudication of the class claims. The headquarters of Concord and its pertinent books and records are located in the Southern District of New York. The individual defendants reside or engage in business in the Southern District of New York, and the convenience of witnesses favors this forum.

### Substantive Allegations

16. Commencing sometime prior to January, 1975 and continuing thereafter, the individual defendants together with AFW

entered into a plan, combination and conspiracy (i) to reeze out the public shareholders of Concord and (ii) to do so at unreasonably low prices, all for the private gain of the individual defendants, by the use of illegal, improper, deceptive and fraudulent acts and practices in violation of their fiduciary duties to the minority shareholders of Concord and to Concord.

- 17. Included among the objects of the defendants' plan, combination and conspiracy as aforesaid, was (i) to freeze-out and eliminate all of the public shareholders of Concord at unreasonably low prices representing but a fraction of the true value of Concord stock; and (ii) to do so without any valid business reason of Concord, but rather for the private gain of the Weinsteins by the use of illegal, improper, deceptive and fraudulent acts and a course of conduct in breach of their fiduciary duties to the minority shareholders of Concord and to Concord.
- and continue to implement their plan, combination and conspiracy as aforesaid, by, among other means, (i) causing the Board of Directors of Concord to approve an Offer of Purchase which was to be followed by a proposed merger of AFW into Concord to be effected in colorable compliance with New York merger statues, but which was really intended to freeze-out all minority shareholders of Concord, with the timate objective of permitting the individual defendants to expropriate for their own personal benefit approximately \$2,800,000 of the public's equity in Concord; and (ii) causing Shearson Hayden Stone, Inc., an investment banking firm with an affiliation with a member of the Board of Directors of Concord,

to recommend such price of \$3 per share in accordance with the defendants' preconceived plan.

19. As is more particularly set forth hereinafter, in furtherance of and pursuant to the aforesaid illegal plan, combination and conspiracy, on or about February 6, 1975 the individual defendants caused AFW to disseminate to the public shareholders of Concord and to the investing public an Offer to Purchase for \$3 per share all of the outstanding shares of common stock of Concord held by members of the public, and, on or about February 12, 1975 the individual defendants caused Concord to file preliminary proxy material with the SEC relating to a special meeting of stockholders of Concord to vote on the aforesaid merger between AFW and Concord. The objective of the defendants sought by means of the Offer to Purchase was (i) to entice and induce ill-considered and hasty decisions by Concord's minority shareholders to tender their shares at a price having the appearance of a small premium over the then market price which had previously been depressed by the defendants' themselves; (ii) to acquire a sufficient number of Concord shares to cause the delisting of Concord stock from the American Stock Exchange and relegate the trading in the stock to the overthe-counter market; (iii) to thereafter acquire in the over-thecounter market, where there would be little or no liquidity and depth the remainder of the public interest in Concord at even lower prices; and (iv) to eliminate, if a sufficient number of Concord shares were picked up through the Offer to Purchase, the necessity of a shareholder meeting accompanied by full proxy disclosure in which the defendants would be compelled to state the true purposes of the merger.

the AFW-Concord merger in late February and early March 1975, the Weinsteins caused Concord to abandon the Offer to Purchase, and to attempt to proceed with the proposed merger of AFW and Concord by means of a proxy statement disseminated on or about March 17, 1965 to solicit shareholder approval for such merger. In said proxy statement, defendants conceded that there is no business purpose of Concord to be served by the merger; and that the sole purpose of the merger is to enrich the Weinsteins by enabling them to acquire a substantial portion of the public shareholders' equity in the assets and earnings of Concord without any investment on the part of the Weinsteins, and to thereafter manage and operate Concord FeTI from public scrutiny.

#### FIRST COUNT - DERIVATIVE CLAIM AGAINST DEFENDANTS AFW, ALVIN WEINSTEIN and FRANK WEINSTEIN

- 21. This Count is brought by plaintiff derivatively on behalf of Concord against the individual defendants and AFW.
- 22. This Count arises under the common statutory law of the State of New York.
- 23. The individual defendants, acting in concert, and together with the consent and connivance of defendant AFW, have engaged and participated in and are continuing to engage and participate in the fraudulent, illegal, and wrongful acts and transactions hereinafter alleged, none of which serve any valid business purpose of Concord, to the irreparable and immediate damage and injury of Concord.
- 24. The individual defendants realizing how well Concord had been prospering and would prosper, and for the purpose of usurping 100% ownership of Concord and expropriating, without cost to

themselves, a substantial portion of the public's equity in.

Concord's assets and earnings, to the deprivation of Concord and its public stockholders, and in furtherance of their aforesaid illegal plan, combination and conspiracy, artificially depressed the market price of shares of Concord common stock by (i) causing Concord to refrain from declaring any cash dividends, although Concord had and continues to have large sums of cash and other liquid assets which are unnecessary for its operation of business; and (ii) causing Concord to issue financial statements in which present earnings were improperly understated or deferred.

- plan, combination and conspiracy, the individual defendants caused AFW to be organized, transferred to AFW 1,226,549 shares of Concord's common stock theretofore held by them individually in exchange of all of the capital stock of AFW and then caused the boards of directors of Concord and AFW, over both of which they are control, to approve a merger of AFW into Concord pursuant to which (i) all outstanding shares of AFW would be converted into shares of common stock of Concord, (ii) all shares of common stock of Concord held by AFW would be cancelled; and (iii) holders of all other outstanding shares of common stock of Concord will receive, in lieu therefor, cash in the amount of \$3 per share.
  - (b) Since AFW holds approximately 68% of the common stock of Concord, the remaining stockholders of Concord could not vote down the proposed merger even if they were all to vote against it.

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- (c) The result of such a merger would be (i) the elimination of all stockholders in Concord cher than the individual defendants; (ii) the expenditure by Concord of upwards of \$2,000,000 for no legitimate business purpose of Concord; (iii) to increase the interest of the Weinsteins in the equity of Concord from \$9,494,000 to \$12,285,000 or more, without any investment by them personally; and (iv) enable said defendants to manage and operate Concord free from public scrutiny and accountability.
- will force Concord to become a purchaser of its common stock when it has no legitimate business reason for so doing, and it will divert upwards of \$2 million of Concord's liquid assets which would otherwise be utilized to expand the business of Concord in the interest of all shareholders, all for the personal benefit of the Weinsteins, and constitutes:
- (a) a waste and spoilation of Concord's assets for the sole benefit of AFW and the individual defendants and highly detrimental and unfair to Concord and its public common stockholders, and
- (b) a breach by the individual defendants and AFW of the fiduciary duty they owed to Concord and its stockholders.
- bring this action would be futile because the individual defendants are unable to control and do control and dominate Concord's board of directors. Said defendants are the very individuals who profit from the wrongs herein alleged.

- 28. Demand upon the shareholders of Concord to bring this action is unnecessary and would be futile because:
- (a) under the law of New York, demand upon the shareholders is unnecessary;
- (b) AFW owns such number of shares of Concord's common stock as gives it control of Concord;
- (c) the wrongs alleged herein constitute a waste of Concord's assets and cannot be ratified by the shareholders of Concord.
  - 29. Plaintiff has no adequate remedy at law.

## SECOND COUNT - CLASS CLAIM AGAINST ALL DEFENDANTS

- 30. Plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 20 and 23 through 26 of this complaint.
- 31. This Count is brought by plaintiff on behalf of himself and all other members of the Class against all defendants.
- 32. This Count arises under the common and statutory law of New York.
- offering to eliminate the public shareholders of Concord is unconscionably low. Notwithstanding that the public paid \$15.00 per share for Concord stock in 1968, and \$20 per share in 1969 (when the Weinsteins personally derived gross proceeds of \$4 milion from the sale of Concord stock for their own accounts) and notwithstanding that Concord has prospered by an increase in its

shareholder equity from \$6.75 per share to \$7.82 per share, the Weinsteins still intend to enrich themselves further at the public's expense by using the shareholder's own money to finance their elimination.

- 34. The proposed merger plan, scheme and conspiracy, as aforesaid, entered into by defendants pursuant to which they are seeking to freeze-out and eliminate the public stockholders of Concord is a fraud by defendants upon the members of the Class and constitutes a willful violation by defendants of their fiduciary obligations to members of the Class in that:
- (a) the price of \$3 per share sought to be foisted upon the stockholders of Concord other than AFW is grossly unfair and calculated to result in unconscionable gain to AFW and the individual defendants;
- (b) the actions taken pursuant to the aforesaid illegal plan, combination and conspiracy reflect a clear abuse of trust, failure to exercise proper business judgment, and breach of fiduciary duties owned by defendants to the members of the Class;
- (c) said plan is sought to be accomplished by a false and deceptively incomplete and misleading proxy statement and by the concealment of material facts relating to the value of the common stock of Concord; and
- (d) the proposed merger constitutes self-dealing and majority tyranny on the part of the defendants serving no valid business purpose of Concord and it is intended solely for the purpose of self-aggrandizement and enrichment of the individual.

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defendants and their families, and any right of appraisal is illusory and inadequate.

- acts and practices above described, constituted and continue to constitute (a, a breach of the fiduciary duty owed by the individual defendants as directors and controlling shareholders of Concord to minority shareholders; and (b) a breach of the duty owed by said defendants of loyalty and good faith to the minority shareholders of Concord to act on all decisions with respect to the assets and affairs of Concord for the benefit of all of such shareholders and not for their own personal benefit.
- 36. Plaintiff and the Class have no adequate remedy at law or under the appraisal statutes of New York or any other jurisdiction, and they will suffer immediate and irreparable loss and injury in the proposed merger is not enjoined.

WHEREFORE, plaintiff demands judgment as follows:

- (a) that defendants be preliminarily and permanently enjoined from taking any further action toward or with a view to a merger between AFW and Concord upon terms which will deprive Concord's public shareholders from an opportunity to participate in an equity position in the surviving corporation and to the assured to an adequate marketplace for the purchase and sale of Concord securities.
- (b) that the individual defendants and AFW Fabric Corp. account to Concord and the Class for all damages and injury sustained by Concord as a result of the fraudulent, illegal and

wrongful acts and transactions complained of herein;

- (c) that this Court declare the Second Count to be a class action pursuant to Rule 23, Federal Rule of Civil Procedure;
- (d) that this Court grant such other and further relief as may be just and proper in the premises; and
- (e) that this Court award to the plaintiff costs and disbursements of this action including reasonable fees to plaintiff's attorneys.

LIPPER, LOWEY & DANNENBERG and BURTON L. KNAPP

By Renter J. Knish Attorneys for Plaintiff in Smith

747 Third Avenue New York, New York 10017 (212) 759-1504

By.

ss.:

STATE OF NEW YORK )
COUNTY OF NEW YORK )

BURTON L. MIMPP, being duly sworn, deposes and says:

That deponent is co-counsel of record to the plaintiff, along with Messrs. Lipper, Lowey & Dannenberg, in the within-entitled action.

Plaintiff is a person not within the county where deponent has his office, and he is a resident and citizen of San Francisco, California. All of the material allegations of the ithin Complaint are based upon telephone conversations and correspondence between deponent and the plaintiff, and more particularly upon an Offer to Purchase by AFW Fabric, Corp., dated February 6, 1975, and a Proxy Statement of Concord Fabrics, Inc., dated March 17, 1975, described in the complaint, and various documents and reports filed by Concord Fabrics, Inc. with the Securities and Exchange Commission and American Stock Exchange. I have read the annexed complaint and know it to be true to my knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

Sworn to before me this 241, day of March, 1975

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NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

BARRY L. SWIFT,

Plaintiff, :

-against-

75 Civ. 1465 : Judge Tyler

CONCORD FABRICS, INC., AFW FABRIC CORP., : NOTICE OF MOTION ALVIN WEINSTEIN and FRANK WEINSTEIN,

UNDER RULE 65

Defendants.

PLEASE TAKE NOTICE that upon the summons and verified complaint herein, duly filed on March 24, 1975, the annexed affidavit of BURTON L. KNAPP, duly sworn to the 25th day of March, 1975, and upon all prior proceedings herein, plaintiff herein will move the Honorable Lloyd F. MacMahon, United States District Judge, in Room 2804 in the United States Courthouse for the Southern District of New York, at Foley Square, New York, New York, on the 4th day of April 1975, at 2:15 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard; or alternatively, before such other United States District Judge to whom this action shall be assigned, for the following relief:

(A) for an Order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, granting a preliminary injunction enjoining defendants AFW Fabric Corp. ("AFW") and Concord Fabrics, Inc. ("Concord") during the pendency of this litigation from consummating a merger of defendants AFW and concord described in a Proxy Statement of Concord dated March 17, 1975; and

(B) granting plaintiff such other and further relief as to this Court may seem just and proper;

PLEASE TAKE FURTHER NOTICE that answering papers on this motion must be served on or before March 31, 1975.

Dated: New York, New York
March 25, 1975

Yours, etc.

LIPPER, LOWEY & DANNENBERG and BURTON L. KNAPP

By Dentey & Kingly Burton L. Knapp

Attorneys for Plaintiffs Office and P. O. Address 747 Third Avenue New York, New York 10022

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

BARRY L. SWIFT,

Plaintiff,

-against-

CONCORD FABRICS, INC., AFW FABRIC CORP., ALVIN WEINSTEIN and FRANK WEINSTEIN,

AFFIDAVIT IN SUPPORT
OF MOTION FOR A PRE-LIMINARY INJUNCTION

75 Civ.

Defendants.

STATE OF NEW YORK )
COUNTY OF NEW YORK )

BURTON L. KNAPP, being duly sworn, deposes and says:

- enberg to plaintiff in this action. I submit this affidavit in support of plaintiff's application in this action, as well as an application made on additional grounds in a related action entitled Marshel v. AFW Fabric Corp., et al [75 Civ 1018], for a preliminary injunction. Such relief is needed to prevent the individual and corporate defendants from consummating a plan of the Weinstein family to "go private" by means of a freeze-out merger. The proposed merger is now conceded to have no business purpose of Concord Fabrics, Inc. ["Concord"], but rather is for the purpose of eliminating on arbitrary, insider-dictated terms a 32% minority interest in Concord and transferring to the pockets of the Weinsteins \$2.8 million of the public's equity in Concord.
  - 2. Barry L. Swift, the plaintiff above-named, is a citizen and resident of San Francisco, California, and a private investor who owns 1,020 Concord shares purchased several years ago at approximately the same price defendants Alvin and Frank Wein-

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at \$20 per share from which they realized net proceeds of over \$3.7 million. Mr. Swift was also the plaintiff in a prior action untitled Swift v. Concord Fabrics, Inc., et al, instituted on March 3, 1975, in the Supreme Court of the State of New York, New York County [Index number 03594/75]. The New York action was voluntarily dismissed by Mr. Swift by a notice served on March 24, 1974, prior to the filing of the complaint in this action. The dismissal of the New York action and institution of this suit was precipitated by certain revelations made to the undersigned on March 21, 1975, including:

- ment, dated March 17, 1975, that the proposed merger serves no business purpose of Concord; and that the sole purpose is to increase the interest of the Weinsteins in the equity of Concord from \$9,494,000 to \$12,285,000, without the investment by them of a single penny; to increase their interest in Concord's net earnings in the most recent fiscal year from \$354,000 to \$442,000, and to enable the Weinsteins to manage and operate Concord free of public scrutiny and solely with regard to their own personal interests; and
- (b) statements in the affidavit in opposition dated March 21, 1975, of Sidney J. Silberman, Esq., counsel for the defandants, to the effect that this Court lacks both primary and pendent jurisdiction to consider either federal or state questions raised in the Marshel action and injunction motion.

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- 3. In view of Mr. Silberman's apparent attempt to fragmentize the issues involved between state and federal questions, and to avoid duplication of effort in two se, rate forems and to place before this Court at the same time as the Marshel/is heard all questions relating to the subject of "going private" and freeze-out mergers, plaintiff herein has invoked the diversity jurisdiction of the Court pursuant to Section 1332 of the Judicial Code [28 U.S.C. §1332]. This action is, therefore, brought as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure seeking only injunctive relief, as well as a dervative action to prevent the waste and dissipation of Concord's ssets attendant upon an estimated and inditure of upwards of \$2 million to accomplish an objective solely in the personal interest of the individual defendants. As a result, primary jurisdiction, as opposed to pendent jurisdiction, is conferred upon this Court to entertain all relevant questions of New York law, and to enforce principles engrained in the law for centuries to prevent majority tyranny in corporate affairs, including freezeout mergers having no business purpose, and intended for the purpose of enriching corporate insiders and freeing their conduct from further shareholder scrutiny.
  - 4. The events leading to this suit were set in motion on February 6, 1975, when the Weinsteins caused Concord to announce a two-pronged "going private" plan consisting, first, of a cash tender offer expiring on March 5 to purchase 559,000 Concord shares held by the public for \$3 per share, to be followed almost immediately by a planned merger of AFW into Concord on April 1, 1975, upon terms under which the Concord minority would be eliminated entirely upon the payment of the same \$3 per share. The Weinsteins thus gave shareholders the choice between a sudden or a lingering death.

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- On Friday, February 28, 1975, I was informed that the Marshel action referred to above had been filed in this Court and that the plaintiff therein had moved simultaneously by way of order to show cause for a prelminary injunction. On the morning of Monday, March 3, 1975, plaintiff herein commenced by personal service of the summons and complaint on the four abovenamed defendants a representative action in the Supreme Court, New York County to enjoin, as illegal under state law, both the tender offer and the contemplated merger which was to follow. Shortly after the institution of plaintiff's state action on March 3, Concord issued a press release stating that the tender offer was being withdrawn; that all tendered shares would be returned, and that wanagement was proceeding via a proxy statement filed with the SEC to call a meeting of shareholders to approve the merger of AFW into Concord on the terms set forth in the aborted tender offer of February 6, 1975.
- 6. Thereafter, by means of a notice of meeting and accompanying proxy statement dated March 17, 1975, a special meeting of Concord's shareholders to approve the AFW-Concord merger was called for April 10, 1975. I received and reviewed on the afternoon of Friday, March 21, a copy of the Concord proxy statement, and I contacted counsel for the plaintiff in the Marshel action to ascertain the status of his motion scheduled for that day. I was informed that the motion had been adjourned for one week until March 28, 1975, and that the defendants' opposing affidavits were to be served by 5:00 P.M. on March 21st.
- 7. My review of the March 17 proxy statement, and defendants' opposing affidavits which counsel in Marshel graciously made available to me in the early evening of March 21, instantly

revealed the full extent of the "rip-off" sought to be perpetrated on Concord's minority shareholders. It also revealed why the defendants hastily retreated from the tender offer made on February 6, 1975, almost immediately after the institution of the Marshel action and plaintiff's initial action in the New York State court. In simplest terms, defendants intended through the cynical ploy of the tender offer to pressure minority shareholders into hasty, ill-advised tenders of their Concord shares in the hope that a sufficient number would have been reacquired by AFW to facilitate delisting of Concord stock from the American Stock Exchange. If this had occurred, defendants might then have avoided the necessity for the merger, since mop-up of the residual minority interest would have been a simple matter once Concord stock was relegated to the over-the-counter market. Since the March 17 proxy statement now reveals that less than 40% of the public shares were tendered prior to withdrawal of the tender offer, leaving in public hands more than a sufficient supply to maintain the Amex listing, the litigation compelled the defendants to run the gauntlet of far fuller disclosure in a proxy statement, including the grudging concession that the only purpose of the proposed merger is:

have the Company returned to their sole ownership, with the ability to operate it without public scrutiny and solely for their own benefit, and will have their interest in the Company's equity and in its earnings increased as described below under the caption "Effect of Merger on Weinstein Family" [Proxy Statement, p. 4].

<sup>\*</sup> While other criteria also come into play, the American Stock Exchange requires as a condition of continued listing that at least 200,000 shares remain in the hands of the public.

8. Plaintiff herein urges that the foregoing statement and other statements of similar purport in the Concord proxy statement of March 17, 1975 --- all of which were flushed out as a direct result of the Marshel and Swift lawsuits and termination of the tender offer --- squarely invoke the primary jurisdiction of this Court in a diversity case to determine all questions of legality under New York state law, even if federal jurisdiction and pendent jurisidiction are found to be lacking.

#### The Silberman Affidavit

9. The affidavit in opposition to the Marshel motion of Sidney J. Silberman, Esq., dated March 21, 1975, seeks, in simple terms, to create a legal "no man's land" for freeze-out mergers where corporate fiduciaries hope to simultaneously avoid the reach of state and federal law. Thus, Mr. Silberman urges that Rule 10b-5 does not apply because the New York appraisal statute is available for a judicial determination of the "fair value" of Concord shares if a shareholder believes that \$3 per share is unconscionably unfair; and that under such circumstances there is no pendent jurisdiction to consider "state law questions", including the question as to whether the transaction constitutes a gross breach of the individual defendants' fiduciary duties to minority shareholders and to Concord. It should be noted that the Silberman affidavit carefully refrains from stating that the total absence of a business purpose is irrelevant to the issue of state-created fiduciary duties squarely raised by the complaint in this action under New York law and precedents since time immemorial, notwithstanding that a diligent effort has been made

to achieve colorable compliance with the New York corporate merger statutes. We shall further demonstrate in our brief that the outmoded, expensive and indeed illusory, remedy of appraisal under state law is by no means the exclusive remedy available under the law of New York to remedy the unconscionable elimination of minority shareholders, and that the conduct sought to be enjoined herein is no different in essence than that struck down by the courts long before the current phenomenon known as "going private" was conceived. In the final analysis, "going private", in the absence of a compelling corporate business purpose, is a device through which corporate insiders are afforded unbridled opportunities to take unconscionable advantage of investors during a temporary market decline not seen in a generation. This is particularly so in the case of Concord where the merger price has been dictated by a family-dominated inside group without any meaningful outside influence or "oppositeness". Even the socalled "independent investment bankers" hired and paid by the Weinsteins to render an opinion as to the price paid to the public have an affiliation through a family relationship to a Concord director, and long associations with Concord in other respects.

should be granted on one or more of the grounds urged herein and in the Marshel application. It was initially intended to bring this application on by order to show cause rather than by ordinary notice of motion with a view to achieving a fair presentation of all questions, state and federal, on March 28, 1975, the presently scheduled hearing date for the Marshel application.

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However, when I presented an order to show cause to Judge Tyler late in the afternoon of March 24, 1975, I was informed that he was contemplating his departure from the Bench within a week to assume his new position, and although he had referred Marshel and this case to the reassignment committee, it had not yet designated a successor Judge. This application was forthwith made by notice of motion this date in the hope that it can be brought on for a hearing simultaneously with the Marshel application.

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Sworn to before me this 25th day of March, 1975.

Burton L. Knapp

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AFFIDAVIT OF SIDNEY J. SILBERMAN IN OPPOSITION :

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	
	x
BARRY L. SWIFT,	:
Plaintiff,  -against-  CONCORD FABRICS, INC., AFW FABRIC CORP., ALVIN WEINSTEIN and FRANK WEINSTEIN,  Defendants.	75 Civ. 1465 LFM  AFFIDAVIT IN OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION
STATE OF NEW YORK ) ss.:	-X

SIDNEY J. SILBERMAN, being duly sworn, deposes and says:

- 1. I am a member of Kaye, Scholer, Fierman, Hays & Handler, attorneys for defendants herein, and submit this affidavit in opposition to plaintiff's motion for a preliminary injunction against consummation of the merger of AFW Fabric Corp. ("AFW") into Concord Fabrics Inc. ("Concord").
- 2. This action was concededly brought as a supplement to Marshel v. AFW Fabric Corp., et al, 75 Civ. 1018, and this motion was made as a supplement to the pre-liminary injunction motion in that action, in an attempt to present the question of the validity of the proposed merger under state law as one of primary jurisdiction, in a diversity action, rather than as pendent to a Rule 10b-5

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claim. (Affidavit of Burton L. Knapp, ¶3). The allegations in the complaint herein are substantially the same as in the amended complaint in <u>Marshel</u>, and the Knapp affidavit adds no <u>facts</u>.

- 3. My affidavit, sworn to March 21, 1975, and the affidavits of Martin Wolfson and David R. Caplan, submitted in opposition to the motion in Marshel, set forth the relevant facts, and in order not to burden the Court with repeating them here, I respectfully request that said affidavits in Marshel be deemed also submitted in opposition to this motion; copies of said affidavits have been served on plaintiff's attorneys herein. Only a few additional facts are required in this affidavit.
- 4. Although the complaint alleges (¶3) that the amount in controversy exceeds the jurisdictional prerequisite of \$10,000, this allegation is on information and belief, and is not supported either by the complaint or by the Knapp affidavit. In fact, the jurisdictional minimum is not met either for the purported class action or for the derivative count:
- (a) As to the class action (Second Count), assuming plaintiff does own 1,020 shares of Concord stock, the market value of that stock, based on the \$2-1/2 closing price on the American Stock Exchange on March 24, 1975, the day before this action was commenced, was only \$2,550; based on the \$3 to be paid on the merger, its value is only \$3,060; and even at book value which, of course, we contend is not a proper measure of value his stock would be worth under \$8,160.

- (b) As to the derivative action (First Count) the complaint alleges (¶25) that the merger would result in "the expenditure by Concord of upwards of \$2,000,000 for no legitimate purpose of Concord", and (926) that this would constitute "a waste and spoilation [sic] of Concord's assets." Since the vast bulk of the amount to be expended by Concord is for the payment of \$3 per share for the stock held by the public, and since the complaint alleges (917) that the \$3 price is "but a fraction of the true value of Concord stock", it appears from the face of the complaint that Concord itself could not be damaged, for it would in effect be buying its stack back at "a fraction of the true value" and would thus be benefitted substantially. There is thus no amount in controversy as far as Concord is concerned, and since plaintiff himself does not meet the jurisdictional minimum, there is no jurisdiction under 28 U.S.C. §1332(a).
- 5. Accordingly, plaintiff cannot show any likeli-hood of success in this action and his motion for a preliminary injunction should be denied.
- 6. Mr. Knapp persists in repeating (¶7) without any support whatever the charge made in Marshel that AFW's tender offer was designed to avoid compliance by Concord with the Proxy Rules. Moreover, plaintiff's Memorandum attempts (on p. 6) to create the false impression that Concord did not file its proxy material with the SEC until after the tender offer was withdrawn on March 3rd. My affidavit in the Marshel motion (¶¶ 5 and 8) shows that Concord in fact filed preliminary proxy material with the

AFFIDAVIT OF SIDNEY J. SILBERMAN IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

SEC on February 12th, and could not in law have avoided complying with the Proxy Rules.

Sidney/JU Silberman

Sworn to before me this 2nd day of April, 1975

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No. 03-024-350

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Certificate field in New York County

Term Expires Majon 30, 1976

#### NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARNOLD MARSHEL,

Plaintiff,

-against
AFW FABRIC CORP., CONCORD FABRICS, INC., 75 Civ. 1018: LFM
ALVIN WEINSTEIN and FRANK WEINSTEIN,

Defendants.

BARRY L. SWIFT,

Plaintiff,

-against
CONCORD FABRICS, INC., AFW FABRIC CORP.,
ALVIN WEINSTEIN and FRANK WEINSTEIN,

Defendants.

NOTICE OF APPEAL

NOTICE OF APPEAL

Pefendants.

NOTICE is hereby given that the respective plaintiffs, ARNOLD MARSHEL and BARRY L. SWIFT, in the above-captioned actions each hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the order of Judge Lloyd F. MacMahon entered in this action on June 25, 1975, denying said

plaintiffs' motions for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Dated: New York, New York July 1, 1975

Yours, etc.

RUBIN, BAUM, LEVIN, CONSTANT & FRIEDMAN

ву:\_

A Member of the Firm Attorneys for Plaintiff in Marshel 645 Fifth Avenue New York, New York 10022 PL-9-2700

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LIPPER, LOWEY & DANNENBERG & BURTON, L. KNAPP

By:
A Member of the Firm
Attorneys for Plaintiff

759-1504

in Swift 747 Third Avenue New York, New York 10017

TO: KAYE SCHOLER FIERMAN HAYS and HANDLER
Attorneys for Defendants
425 Park Avenue
New York, New York 10022

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